IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

STOP H-3 ASSOCIATION, a Hawaiian non-profit corporation, MOANALUA VALLEY COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, and HAIKU VILLAGE COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, for themselves and on behalf of their members; FRANCES M. DAMON, HARRIET DAMON BALDWIN, HELEN HOPKINS, KENT MILLER, JOHN MANNING, HAROLD FUJIWARA and VIRGINIA BROOKS, for themselves and on behalf of all other persons similarly situated; MOANALUA GARDENS FOUNDATION; HUI MALAMA AINA O KO'OLAU; LUCY S. NALUAI; OLIVIA PADEKEN; LEROY CHUNG; RANDY KALAHIKI; PHOEBE KAWELO; ROXANNE VELARDE; WILLIAM T. COLEMAN, JR., individually and as Secretary of the United States Department of Transportation; and RALPH SEGAWA, individually and as Hawaii Division Engineer, Federal Highway Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August, 1976

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Petitioner E. Alvey Wright, Director of the Hawaii Department of Transportation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 533 F.2d 434, and are reprinted in the Appendix hereto, pp. 1a-31a, *infra*. The opinion of the District Court for the District of Hawaii is reported at 389 F. Supp. 1102, and is reprinted in the Appendix, pp. 34a-64a, *infra* (hereinafter referred to as "App.").[1]

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[1] Prior decisions of the District Court on an aspect of the litigation not involved in this Petition are reported at 353 F. Supp. 14 (1972) and 349 F. Supp. 1047 (1972).

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1976. A timely Petition for Rehearing and Suggestion for Hearing *En Banc* was denied on May 21, 1976, with one judge dissenting as to the Petition. (App. 32a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was 28 U.S.C. § 1338(a).

QUESTIONS PRESENTED

The provisions of Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal-Aid Highway Act of 1968 impose certain conditions on the approval of any highway program which "requires the use of . . . any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." The questions presented in this litigation are:

1. Whether these statutory provisions apply to a privately-owned alleged "historic site" determined to be of no state or local significance by the State of Hawaii officials having jurisdiction over the site, and of no national significance by the Interior Department, by virtue of a determination by the Interior Department that the site is of *local* significance?

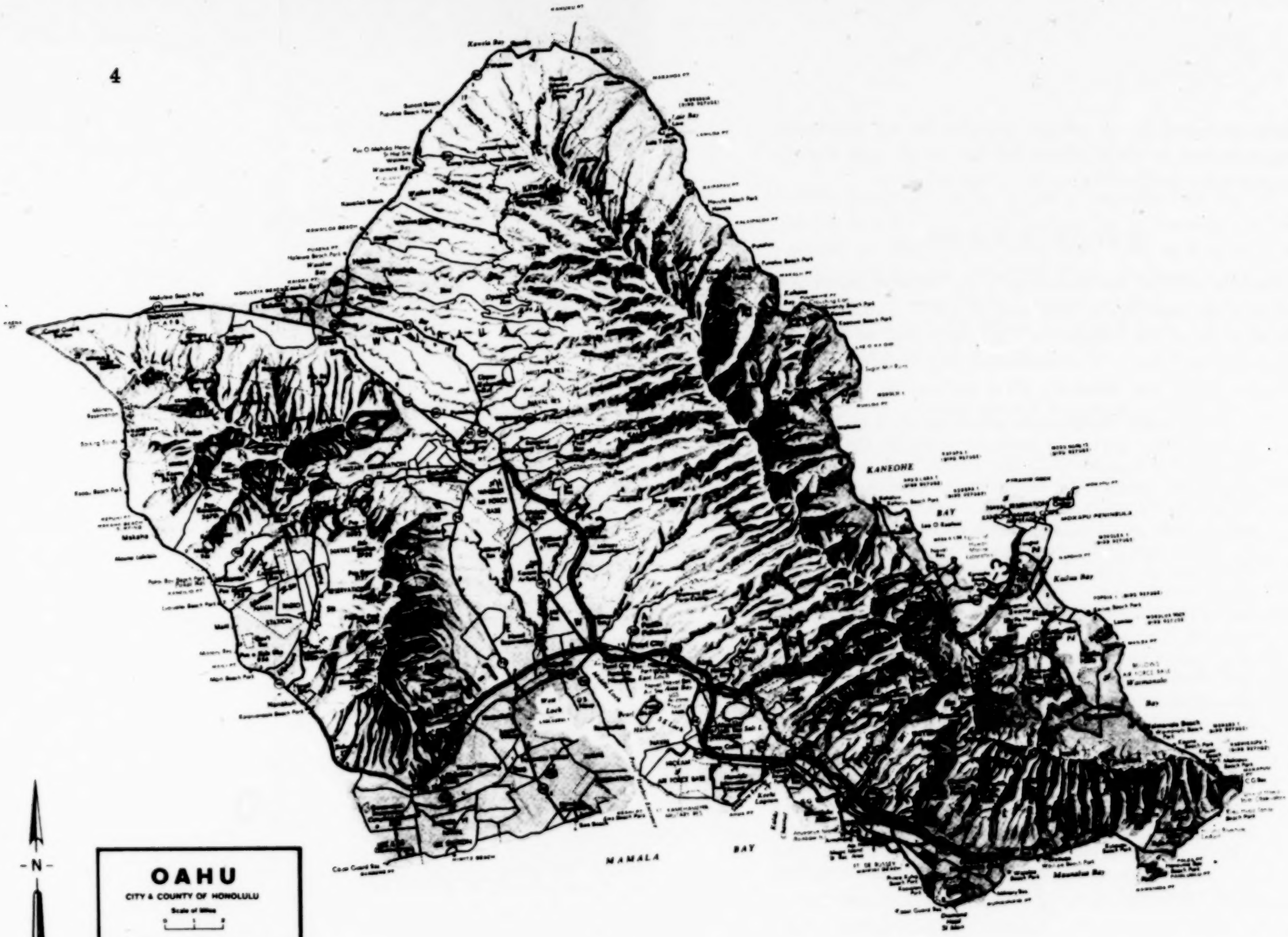
2. Whether these statutory provisions apply to a petroglyph rock, which is not a "site" at all, which had previously been moved from its original location, and which will be

fully protected in its present position by an agreement characterized by the Advisory Council on Historic Preservation to be satisfactory for this purpose?

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 (hereinafter jointly referred to as Section 4(f)), are identical. They provide as follows:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."



HAWAII INTERSTATE AND DEFENSE HIGHWAY SYSTEM
ROUTE H-1, H-2 AND H-3
ISLAND OF OAHU

INTRODUCTORY STATEMENT

This case involves the construction of the Moanalua Valley section of Route TH-3,[2] an interstate and defense system highway from Pearl Harbor to Kaneohe Marine Corps Air Station, in the Honolulu, Hawaii, metropolitan area. As described below, Route TH-3 is necessary both to serve the growing civilian traffic between the leeward and windward coasts of Oahu and to provide direct access between the important military installations on the two sides of the Island. A map showing the location of the proposed route in relation to the City of Honolulu and the major military facilities in the area appears on the facing page.

When the initial decision to construct TH-3 was reached in the early 1960's, the highway was to be routed through a populated area some distance from its presently proposed site. However, public hearings resulted in widespread support to relocate the highway from its then-proposed site to the Moanalua Valley. The Moanalua Valley is a privately-owned tract which was, at the time this suit was commenced, closed to the public and which remains undeveloped except for high tension power transmission towers and lines and a rough trail leading to the lines. Routing the highway through the Moanalua Valley would avoid displacing residents and would prevent an increase in congestion on the already-overcrowded highways and public facilities over or near which the major alternative routes for

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[2] The highway was originally designated as H-3, which indicated that there were no mass-transit-only lanes proposed. As planning progressed, it was determined to include special mass transit lanes. As a result, the highway's designation was changed to TH-3.

TH-3 would have run. Accordingly, based upon the near-unanimous views of the public expressed at the hearings, the route of TH-3 was shifted to its present site through the Moanalua Valley, and construction was started on both ends of the project.

At this point a private group, acting without the approval of the owners of the Valley, applied to the Interior Department to have the Moanalua Valley designated an historic site of national importance and to the State of Hawaii to have the Valley designated an historic site of state or local importance. The same group also requested that a petroglyph rock located in the Valley be designated an historic object. Hawaii State officials did determine that the petroglyph rock was an object of historic significance. However, after review of the application, the Interior Department determined that the Valley itself had no national significance and the appropriate State officials concluded that the Valley had no state or local significance. But despite the findings of no state or local significance by the competent State officials, the Interior Department nonetheless later announced that it had found the Moanalua Valley to be of *local* historic significance.

In his review and approval of the construction of TH-3, the Secretary of Transportation found Section 4(f) inapplicable to the Moanalua Valley because the responsible federal officials had found the Valley to be of no national significance and the responsible State of Hawaii officials had found it to be of no local significance. Thus, he did not make any determination as to whether he was in a position to make the special findings required by Section 4(f) as to a project coming within its scope. (App. 16a-17a) The

Secretary of Transportation did not consider the finding of the Interior Department as to the Valley's claimed local historical significance as one triggering the requirements of Section 4(f) because he concluded that the determination referred to in Section 4(f) as to state or local significance was one to be made by the state and local officials. While the petroglyph rock was clearly an object of local historical significance, the Secretary also apparently determined that Section 4(f) did not apply to the rock because it was an object, not "land from a site" within the meaning of the statute, and because it was undisturbed by the project.

The District Court agreed with the Secretary of Transportation's interpretation of Section 4(f), but a divided Court of Appeals reversed. According to the majority, the Interior Department has power under Section 4(f) to instruct state and local officials that particular sites are of local significance no matter what those officials may determine.

Section 4(f) was intended by Congress to allow state and local officials, who are uniquely well-situated to appreciate the local importance of historic and similar sites, to pass upon the significance of such sites, subject to review of the overall project by the Secretary of Transportation. Section 4(f) was not designed to delegate power to Department of Interior officials in Washington, who are particularly ill-positioned to understand the local significance of sites thousands of miles away, to overrule the findings of the competent state and local officials. Yet the two-judge majority does precisely that. Such a result ignores the plain language and legislative history of an important statute, is opposed to the holdings of other courts, and rides rough-

shod over the traditional federal-state relationships embodied by Congress in Section 4(f). For all these reasons, this case is appropriate for review by this Court.

STATEMENT OF THE CASE

A. Factual Background

1. *Need for TH-3.*—As shown by the map on page 4, TH-3 is to be constructed from Pearl Harbor in the Honolulu metropolitan area on the leeward side of Oahu to the windward side of the island near Kaneohe Marine Corps Air Station. Detailed planning for a leeward-windward highway has been underway for a number of years and the need for the road is well-established.[3] The windward side

[3] Planning for the highway started in 1960 when the National System of Interstate and Defense Highways was extended to Hawaii and initial approval of a leeward-windward interstate highway in the Honolulu area authorized by the Federal Highway Administration. (EIS 2-3) Then, in 1964, the City and County of Honolulu adopted the Oahu General Plan after an extensive economic and planning study participated in by federal, state, and local government agencies; private consultants; and interested civic organizations and private citizens. The General Plan, which is still in effect, is designed to guide development in the Honolulu metropolitan area. TH-3 was included as an important element both of the Plan itself and of the detailed land use map adopted in 1964 by the City and County to carry out the Plan. (EIS 1-2)

Meanwhile, in 1962, the State of Hawaii and the City and County of Honolulu authorized a comprehensive Oahu Transportation study to plan the future transportation network of Oahu, including both mass transit and highways. Participants in the study included representatives of the Federal Highway Administration, Department of Housing and Urban Development, State of Hawaii, and City and County of Honolulu; technical and citizens advisory committees; and expert consultants in various fields. The resulting three volume study and transportation plan, issued in 1967, designated TH-3 as an integral part of the Oahu transportation network. (EIS 8-9)

of Oahu is one of the fastest growing areas in the State of Hawaii. Its population increased 51% between 1960 and 1970, and a similar increase is projected for the next twenty years. (EIS 13)[4] Traffic counts and projections for the years 1976 through 1990 show that the two existing roads are barely adequate to handle present civilian traffic and that new road facilities must be constructed in the near future between the Honolulu metropolitan area and windward Oahu. (EIS 12-14) Morever, there is no present road directly connecting Pearl Harbor with the important military installations on the windward side of Oahu.

2. *Location of TH-3 Through the Moanalua Valley in Response to Citizen Requests.*—Five separate routes from the Honolulu area to the windward side of Oahu were given serious consideration during the initial planning phase of TH-3. The State of Hawaii and other planners favored constructing the highway near the present Likelike highway. However, a number of public hearings were held on the highway project in 1965 and the comments of other government agencies, civic organizations, environmental groups, and private citizens overwhelmingly favored routing TH-3 through the Moanalua Valley, because this would minimize dislocation of residences, would not increase usage of existing public facilities and highways, and would open up the previously inaccessible valley.

Among those favoring realignment were the Commanding General, Headquarters, U.S. Army, Hawaii, who believed that the Moanalua Valley route would be the most useful

[4] "EIS" refers to the six volume final Environmental Impact Statement issued by the Federal Highway Administration on August 8, 1972.

in case of military emergency; the Board of Water Supply, which considered that the Moanalua Valley route would best guard against contamination of the water table; and the Outdoor Circle, a Hawaiian environmental group. (EIS 3-7) As a result of these comments, the highway planners agreed to relocate the route of TH-3. Accordingly, in 1967 TH-3 was officially realigned through the Moanalua Valley along a route initially suggested by the Outdoor Circle and concurred in by the U.S. Armed Forces. (EIS 7)

3. *The Moanalua Valley.*—The Moanalua Valley is in private hands and is now administered by the Trustees of the estate of the deceased owner. When the route for TH-3 was chosen, the Valley was largely overrun with second growth plantings and undeveloped except for the Hawaiian Electric Company's high tension power lines and transmission towers and a rough maintenance trail. The Valley was barred to the public by a locked gate. (EIS 26-27)

At the time the plans for TH-3 were made final, the Trustees were considering redeveloping the Moanalua Valley as a private garden to be accessible to the public and for that reason had commissioned a number of scientific studies of the Valley. The studies concluded that, while the Valley could be redeveloped into an attractive garden area, its botany, wildlife and archaeology, with the exception of the petroglyph rock mentioned above, were of no particular significance. (EIS 33-34; Ex. 5-5 and 7-1)[5] When the highway route was chosen, the Trustees and transportation planners met and agreed on a number of steps to as-

[5] "Ex." refers to exhibits introduced by the parties at the trial and submitted as Appendices to the Court of Appeals.

sure the compatibility of TH-3 and the proposed gardens, as follows:

(a) *Access to Gardens.* At the Trustees' request, the plans for TH-3 were revised so that the highway could serve as the access to the proposed gardens. Thus, the State agreed to construct vehicle access and cross-over routes in the Valley so that visitors from both leeward and windward Oahu could park in the Valley to visit the proposed gardens. The Trustees, in turn, agreed to construct paths from the parking areas so that visitors could visit the redeveloped garden areas. (EIS 29-31)

(b) *Protection of Petroglyph Rock.* The highway planners and the Trustees also considered the best means of safeguarding the petroglyph rock. The rock, which contains prehistoric drawings of local value, had been inaccessible to the public. The Trustees and the State agreed that the State would divert slightly the course of the Moanalua stream, which threatens to inundate the rock in times of flood. The State also agreed to screen the highway, which will be nearly 200 feet from the rock, by mature plantings. The Trustees agreed to develop the rock site as an exhibit area accessible to the public. (EIS 63-64; Ex. 7-18, p. 4) According to the Advisory Council on Historic Preservation, this agreement would adequately protect the rock from any potential impact from the construction of the highway. (Ex. 7-18)

Based upon the foregoing understandings, the Trustees agreed to the acquisition by the State of the portions of the Valley needed for TH-3. (EIS 29-30)

4. *Requests for Historic Status for Moanalua Valley.* On June 7, 1971, the Hawaii Historic Places Review Board

considered and rejected the idea of nominating the Moanalua Valley to the Secretary of Interior's National Register[6] of historic sites and objects because of the marginal character of the Valley's archaeological remains and the dubious nature of the only historical claims.[7] Thereafter, the Moanalua Gardens Foundation, a private group which had neither official status nor any ownership interest in the Valley, made a series of requests seeking historic status for all or part of the Moanalua Valley, with the following results:

(a) *National Significance of Valley Rejected by Interior and Landmark Status Denied.* In March, 1973, the Foundation submitted an application to the Department of Interior to have the Valley made a National Historic Landmark, and sent a copy of its request to the Hawaii Historic Places Review Board. Studies were then undertaken by a state professional team composed of historians and archaeologists and by the National Park Service Office of Archaeology

[6] The National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, authorizes the Secretary of the Interior to maintain a National Register of historic sites, buildings, objects, and the like, of national, state or local significance, and established the Advisory Council on Historic Preservation to consult with federal agencies before agencies could impair National Register properties. Under the NHPA, each state appoints an Historic Preservation Officer whose responsibility it is to recommend appropriate sites, objects, etc., to the Secretary of Interior for enrollment on the Register. For Hawaii, the Historic Preservation Officer at the time of the filing of this suit was the Chairman of the Board of Land and Natural Resources, who acts upon the recommendation of the Hawaii Historic Places Review Board. Hawaii Rev. Stat. §§ 6-16.1, 6-16.2(11).

[7] These were based upon "oral traditions" recorded earlier this century by a former owner of the Valley. These "traditions" had never been examined by scholars and upon examination did not withstand professional scrutiny. (Ex. 7-10, 7-17)

and History. The State group concluded that the application was unjustified, and indeed the Park Service concluded that "it would not be possible . . . to professionally defend" a grant of the application. (Ex. 7-10) Accordingly, on October 3, 1973, the Interior Department's Board on National Parks and Historic Sites, Buildings, and Monuments, found that the Valley was not of national significance and recommended rejection of the application. (Ex. 7-1; *see also* Ex. 7-4)

(b) *State and Local Significance of Valley Rejected by Hawaii, and National Register Nomination Denied.* On November 19, 1973, the Foundation asked the Hawaii Historic Places Review Board to consider once again nominating the entire Valley to the National Register. Ultimately, on August 4, 1974, the Board found that the "historical" information submitted by the Foundation was "insubstantial," "deficien[t]," and "inaccura[te]." The Board determined that the Moanalua Valley was of no state or local significance as an historic site. (Ex. 5-5; 7-10)

(c) *Local Significance Found by Interior and Valley Found Eligible for Register.* Meanwhile in July, 1973, the Foundation had also attempted to nominate the Valley for National Register status directly by filing an application with the Interior Department. This procedure was rather irregular, since normally such nominations are made by the State Historic Preservation Officer.[8] Thereafter, on May 8, 1974, the Secretary of Interior issued a determination that the Valley "may be eligible" for inclusion on the National Register. 39 Fed. Reg. 16175, 16176. The Secretary admitted that the Valley was not of national sig-

[8] *See* Ex. 5-9 (National Park Service Form 10-300 (July, 1969)) and App. 23a, n.2.

nificance but contended that it had *local* significance. (Ex. 7-14)[9]

(d) *Hawaii Nominates and Interior Enrolls Petroglyph Rock on National Register.* Also at the request of the Foundation, in early 1973 the Hawaii Historic Places Review Board recommended, and the Hawaii Historic Preservation Officer nominated, the petroglyph rock for inclusion on the National Register as an historic object. On July 23, 1973, the petroglyph rock was placed on the National Register. 39 Fed. Reg. 6402, 6422.

5. *Decision of the Secretary of Transportation.* Based upon the above-described facts, the Secretary of Transportation concluded that the provisions of Section 4(f) were not applicable either to the Moanalua Valley or to the petroglyph rock and that construction of the highway could proceed. (App. 8a) It appears that the Secretary relied upon the following analysis to reach his conclusions:

(a) *Moanalua Valley.* The Valley had been found to be of no national significance by the Interior Department and of no state or local significance by the Hawaii authorities. Section 4(f) applies only to historic sites determined to be of "national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." (See p. 3, *supra*) Since, under the statute, federal officials are to make findings as to national significance and state and local officials are to make findings

[9] Whatever the significance of this finding, the Secretary of the Interior did not then and never has either nominated or placed the Moanalua Valley on the National Register. Supplemental Memorandum of Federal appellees, filed with the Court of Appeals on October 22, 1975. In any event, the question is not as to the Secretary of the Interior's power under the NHPA but as to the proper construction of Section 4(f).

of state and local significance, based upon the negative findings of these officials as to the matters within their respective competence, the Valley was simply not within the statutory coverage. The indication of "local significance" by the Secretary of Interior, even if correct, was irrelevant because the Secretary of Interior had no authority or "jurisdiction" to make a determination of local significance for the purposes of Section 4(f).

(b) *Petroglyph Rock.* The petroglyph rock was subject to an agreement which the Advisory Council on Historic Preservation had found would "satisfactorily" protect the rock in its present location. Moreover, the rock is an object, as its nomination to the National Register specifies. Since Section 4(f) applies to the "use" of "land" from a "site" for highway programs, its provisions are inapplicable to the petroglyph rock both because the rock is not "land" or a "site" and because it is not being "used" in the project.

B. Proceedings Below

1. *The Decision of the District Court.*—The present litigation consists of two suits, filed July 19, 1972, and April 9, 1973, by certain organizations and individuals opposed to the construction of a leeward-windward interstate highway, and consolidated by the District Court. The consolidated complaint raised no fewer than eighteen separate contentions as to why construction of TH-3 should be enjoined.[10] Commencing on December 3, 1974 the District

[10] In addition to those at issue in this Petition, these contentions included numerous alleged inadequacies in the Environmental Impact Statement; various claimed violations of the Federal-Aid Highway Act; a number of asserted inconsistencies with the Clean Air Act and the National Historic Preservation Act; and an alleged failure to comply with the Honolulu City charter. (App. 39a)

Court held a trial on the merits and rejected all the arguments raised by the plaintiffs. (App. 34a-64a)

With specific reference to the Section 4(f) issues involved in this Petition, the District Court held as follows. First, Section 4(f) does not apply to the Moanalua Valley because the Secretary of Interior has determined it is of no national historic value and State of Hawaii officials determined it was of no state or local historic value. (App. 59a-60a) Second, Section 4(f) does not apply to the petroglyph rock because its particular site is of no significance and a satisfactory agreement has been made limiting the effect of the highway on the rock. (App. 58a-59a)

2. *The Decision of the Court of Appeals.*—The Court of Appeals reversed the District Court by a vote of two to one, holding that the provisions of Section 4(f) apply to both the Moanalua Valley itself and to the petroglyph rock.

As to the Valley itself, the majority seized on the grammar of Section 4(f), observing that the provision's "language" was "disjunctive" and that the term "officials" was plural.[11] (App. 10a-11a, 12a n.15) It then held that if *any* of the officials at whatever level in the federal system—local, state or national—made an affirmative determination as to *either* the national, state or local significance of a site, it was conclusive for purposes of Section 4(f). The majority thus concluded that the Secretary of Interior's finding of local historical significance brought into play the provisions of Section 4(f) as to the Valley notwithstanding that the

[11] The statute applies to "any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." *See* p. 3, *supra*.

authorized state and local officials had found the Valley of no state or local historical significance. (App. 10a-11a) The majority did not concern itself with the obvious implication of its holding that local or state officials could make a binding decision that a site had *national* historical significance.

The Court of Appeals majority also found that the provisions of Section 4(f) apply to the petroglyph rock. The majority believed that because the rock was originally located in the Valley—even though it had been moved from its original location—it "forms the basis for a historic site" which will be "use[d]" by the passage of the highway some 200 feet from the rock. (App. 17a)

Circuit Judge Wallace dissented on both issues. With respect to the Moanalua Valley, Judge Wallace found that only state or local officials had power to determine the local significance of an alleged historic site for purposes of Section 4(f). (App. 27a-29a) In reaching this conclusion, he relied upon the well-established canon of construction that parallel modifying terms ("federal, state, or local officials") apply distributively to parallel modified terms ("national, state, or local significance"). Thus, federal officials determine national significance; state officials determine state significance; and local officials determine local significance. (App. 28a) Since the Interior Department found the Valley of no national significance and the state and local officials having authority over the Valley determined that it had no state or local significance, Section 4(f) did not apply. (App. 27a-28a)[12]

[12] Judge Wallace disputed the authority of the Secretary of the Interior to put the Valley on the National Register, holding that "a reasonable interpretation of all the available sources indicates

With respect to the petroglyph rock, Judge Wallace indicated that since the significance of the rock is primarily as an object of viewing and study, which would be facilitated by construction of the highway, it did not appear that the project would "use" the rock within the meaning of Section 4(f). However, Judge Wallace believed that the District Court's findings on this issue were not adequate and for that reason he would have remanded the case for further findings. (App. 30a)

REASONS FOR GRANTING THE WRIT

Although the precise legal issue here is one of first impression for this Court, the case presents another example of the improper interference with the delicate balance between federal and state relations which has occupied this Court's attention on a number of recent occasions. *National League of Cities* v. *Usery,* 96 S. Ct. 2465 (1976); *Rizzo* v. *Goode,* 96 S. Ct. 598 (1976). In this particular instance, a site concededly of no national historic value has been found by a federal official to be of local significance despite the fact that the appropriate state and local officials made a determination that it had had no local significance. Consequently, contrary to the plans adopted as the result of near-unanimous recommendation by officials and citizens

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that properties of state and local historic significance are not to be listed by the Secretary of the Interior unilaterally without an initial determination of significance by state officials." (App. 20a) However, Judge Wallace further concluded that even if the Secretary of the Interior had "the authority unilaterally to determine a site's local historic significance" for purposes of NHPA, as to local significance he would not be one of the officials having jurisdiction within the meaning of Section 4(f). (App. 25a) The essential issue presented by this Petition, of course, has to do with the construction of Section 4(f), not with the construction of the NHPA.

of Hawaii at a public hearing, and contrary to the intent and purpose of Section 4(f), the construction of Route TH-3 will be delayed or halted.

The result is corrosive to our federal system; it permits a federal official—the Secretary of the Interior—not charged with the administration of the federally-assisted highway program to make a decision having to do with purely local or state historical significance, and to contradict the determinations of the local and state officials that no local or state historical significance exists. Thus, even though the local and state officials have found that there is no local and state historical significance and the federal official charged with the project's administration—the Secretary of Transportation—has determined that it should go forward, the project is halted. The result would be bizarre even if it were mandated by the statute; to reach it through the Court of Appeals' strained construction of the statute is to create a situation necessitating this Court's review.

1. *Section 4(f) Does Not Apply to the Moanalua Valley.*—In reaching the conclusion that Section 4(f) applied to the Moanalua Valley, the two-judge majority of the Court of Appeals erred in a number of respects.

First, the construction given to Section 4(f) by the majority does violence to long-accepted, indeed black-letter, canons of statutory construction:

> "Where a sentence contains several antecedents and several consequents they are to be read distributively. That is, the words are to be applied to the subjects to which they appear by context most properly to relate and to which they are most applicable." 2A Sutherland, Statutory Construction § 47.26 (4th ed. 1973).

This principle has been applied in the federal courts at least since *United States* v. *Simms,* 5 U.S. (1 Cranch) 251, 258 (1803) (Marshall, C.J.). *See also United States* v. *Pritchett,* 470 F.2d 455 (D.C. Cir. 1972); *Mutual Federal Savings and Loan Ass'n* v. *Savings and Loan Advisory Committee,* 38 Wis. 2d 381, 157 N.W.2d 609 (1968). This principle is but a specific application of the general rule that an Act of Congress is not simply to be read as a collection of English words. *See, e.g., Richards* v. *United States,* 369 U.S. 1, 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956).

Section 4(f) applies to historic sites of "national, state, or local significance" as determined by "federal, state, or local officials." Thus, under the statute, federal officials determine national significance; state officials determine state significance; and local officials determine local significance. A grammarian parsing a sentence in a vacuum might fasten upon the "disjunctive language" of the sentence and read all the subjects with all the predicates the way the majority of the Court of Appeals did. But under the accepted canons of statutory construction—which are based on the practicalities of interpreting statutory commands—and where, as here, the judiciary is charged with interpreting these commands in a manner becoming to a federal system, such a result is not appropriate. The drily verbal conclusion reached below not only improperly allows federal officials to instruct state and local officials as to matters of local concern, but leads to the bizarre situation in which local officials are entitled to determine that a site is of national significance.

Second, the decision of the two-judge majority ignores or misreads the legislative history of Section 4(f). Prior

to the enactment of the present Section 4(f) in 1968, the statute was vague as to how the determination would be made as to whether a site was of state or local historical value; indeed, the text of the statute did not focus at all upon the question of state or local, as opposed to national, historical significance.[1] The 1968 amendments were intended to allow state and local officials to make determinations as to state and local historical significance, reserving, of course, to the Secretary of Transportation the ultimate authority to determine whether the federally-funded project should go forward. 23 U.S.C. §§ 103(f), 105(a), 106(a), 109, and 138.

For example, Senator Randolph, the leader of the Senate Conferees, explained that a major purpose of the amendments was to grant authority to state and local officials to pass upon the local significance of a project:

> "I insisted that we must realize that the determination of the local people must be considered. I join my colleague in his feeling that it is important that local people have a leadership. They can properly understand the importance of places that someone from afar may not realize. The importance of such places can only be understood by local people." 114 Cong. Rec. 24029 (1968).

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Furthermore, in response to questions from Senators who were concerned that state or local officials would make improper findings of no significance in order to exempt park, historic, or other such areas from the coverage of

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[1] Prior to 1968, Section 4(f) provided, in relevant part, that "The Secretary [of Transportation] shall not approve any program which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historical site unless . . . ." 80 Stat. 934.

Section 4(f), Senator Randolph stated on three separate occasions that any such possible abuse would be prevented by review of state or local determinations by the Secretary of Transportation. The Secretary of Transportation's authority is his overall authority in this regard with respect to a federally-funded project:[2]

"MR. JACKSON: My understanding is, in connection with the amendments that have been made to Section 4(f) . . . , that even though the local authorities—meaning the State or authorities or subdivision in a State—should decide the highway would not violate the recreational area or the public park area, the Secretary [of Transportation] nevertheless would retain the right to veto the action. Would the Senator from West Virginia . . . respond to that?

"MR. RANDOLPH: The Senator is correct. That is retained in the Secretary's authority." 114 Cong. Rec. 24032 (1968).

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"[MR. YARBOROUGH]: . . . The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?

[2] 23 U.S.C. §§ 103(f), 105(a), 106(a), 109, and 138.

"MR. RANDOLPH: No; they could not ram it through as the Senator has said.

"MR. YARBOROUGH: Do the Secretary of Transportation and the highway officials of the federal government have the power to apply this provision of the bill as written even though the local officials say such site has no significance?

"MR. RANDOLPH: Under their power to approve plans, specifications, and estimates, they can review such decisions." 114 Cong. Rec. 24036-37 (1968).

• • •

"MR. RANDOLPH: I would especially remind the Senator from Texas [Mr. Yarborough] that, under any circumstances, the Secretary of Transportation does not have to accept the local . . . [determination that lands of the type with which Section 4(f) deals are of no significance]. He has authority under the provisions of title 23 to exercise his independent judgment . . . ." 114 Cong. Rec. 24029 (1968).

The majority of the Court of Appeals seized upon this passage as a proof, as it put it, that "the *Federal* power is transcendent." (App. 13a n.15) And so it is, in the sense that the Secretary of Transportation is the master as to whether the project will go forward on a federally-funded basis. But there is nothing whatsoever to indicate that the Secretary of the Interior—or any other federal official—was to be given authority to make determinations of issues of state or local historical significance. Rather, the legislative history is clear that the congressional intent in enacting Section 4(f) was to grant state and local officials power

to make those decisions, subject to the Secretary of Transportation's overall power of review of the project.

Third, the majority's interpretation of the statute is at odds with the decisions of two other Federal courts which have considered the matter. In *Manning* v. *Brinegar,* C.A. No. 74-532 (D.S.C., May 9, 1974), the question at issue was who is empowered to determine whether an alleged historic site is of state or local significance for the purposes of Section 4(f). The District Court there held that "there must be a determination by the proper state or local officials that the land in question is indeed a historic site of state or local significance" before the provisions of Section 4(f) are applicable. Op., p. 14. Similarly, in *Harrisburg Coalition Against Ruining the Environment* v. *Volpe,* 330 F. Supp. 918 (M.D. Pa. 1971), the District Court held that a determination of the state and local officials as to the local significance of a site under Section 4(f) was only subject to project review by the Secretary of Transportation.[3] 330 F. Supp. at 929.

2. *The Misapplication of Section 4(f) to the Petroglyph Rock.*—With respect to the petroglyph rock, the issue presented to this Court is largely one of first impression. Section 4(f) was designed to protect lands available for public enjoyment from being "used" for construction projects. To that end, it covers parks, recreation areas, wildlife refuges, and "land from an historic site." The petroglyph rock is plainly not "land" or a "site" at all; it is an object and is

[3] *See also Pennsylvania Environmental Council, Inc.* v. *Bartlett,* 454 F.2d 613 (3d Cir. 1971). In *Bartlett* the issue was whether the finding of a state official that certain lands were not a public park, recreation area, or historic site was to be followed by the Secretary of Transportation. The Court of Appeals held that where the appropriate state official had found that a particular state-owned property was not an historic site, his ruling was to be accepted.

listed on the National Register as such. As described above, all the authorities who examined the rock concluded that while the rock itself has significance, its present location does not. Accordingly, by its plain language, Section 4(f) does not apply to the petroglyph rock.

Furthermore, the construction of the leeward-windward highway nearly 200 feet from the rock does not "use" the rock in any sense of the word. The rock will be screened from the highway by trees and unaffected by the project except insofar as the highway will make the rock freely accessible to the public for the first time. The Advisory Council on Historic Preservation has found that the rock will be adequately protected in its current location. (Ex. 7-18) The two-judge majority's conclusion that, under these circumstances, the project would "use" the rock is both incorrect and diametrically opposed to the decision of the Court of Appeals for the Eighth Circuit in *ACORN* v. *Brinegar,* 398 F. Supp. 685 (E.D. Ark. 1975), *aff'd on basis of opinion below,* 531 F.2d 864 (8th Cir. 1976). In *ACORN,* the courts held that construction of a highway immediately adjacent to a public park was not a constructive taking requiring the application of the provisions of Section 4(f). 308 F. Supp. at 692-94.

While the decision below as to the petroglyph rock does not present the affront to Federalism that the decision as to the Valley itself does, the issue clearly warrants this Court's consideration as an incident to its review of the issue as to the Valley.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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August, 1976

APPENDICES

APPENDIX A

Opinion of United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STOP H-3 ASSOCIATION, et al., and HUI MALAMA AINA O KO'OLAU, et al., *Appellants,* vs. WILLIAM T. COLEMAN, JR.,* as SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., *Appellees.*	No. 75-1552 OPINION

[March 8, 1976]

Appeal from the United States District Court
for the District of Hawaii

Before: KOELSCH, ELY, and WALLACE, Circuit Judges.

ELY, Circuit Judge:

The Moanalua Valley, a beauteous natural wonder that many believe to be of great significance in Hawaiian history,[1] lies on

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*Originally, the Federal appellee was Claude S. Brinegar, then Secretary of Transportation. His successor has been substituted under the authority of Rule 43(c), Fed. R. App. P.

[1]According to the Advisory Council on Historic Preservation,

> The historical and cultural significance of the [Moanalua] [V]alley stems from Hawaiian folklore and tradition and continues into the 20th century. The valley contains Kamanui, the valley of the great power, and Waolani, the valley of the spirits which was, in tradition, "the dwelling place of the gods." The forest of the valley retains a traditional natural state associated with the legend and history of the area.
>
> The valley was the property of the royal house of Oahu, the scene of battles and other exploits which are extolled in the ancient Hawaiian chants, the Kahikilaulani. After King Kamehameha conquered the island of Oahu in 1796, the valley was the home of his supporters and eventually passed, in 1848, to his grandson, King

Hawaii's Island of Oahu, directly in the path of a proposed Interstate Highway called H-3. The principal issue on this appeal is whether Moanalua qualifies for protection as an "historic site of . . . State or local significance" under section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. § 1653(f) (1970), and section 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1970). (Both statutes, which are essentially identical, are hereinafter referred to simply as "section 4(f)".[2]) Relying on a published determination by the Secretary of the Interior that Moanalua is eligible for inclusion in the National Register of Historic Places, the appellants[3]

Kamehameha V, then to Princess Ruth Keelikolani in 1872, and, upon her death, to her cousin, Princess Bernice Pauhi Bishop who willed it, in 1883, to her friend, Samuel Mills Damon.

Advisory Council on Historic Preservation, *Comments* on an Undertaking by the Federal Highway Administration Having an Effect upon Pohaku ka Luahine and Moanalua Valley, Oahu, Hawaii (August 7-8, 1974) (hereinafter referred to as "Advisory Council, *Comments*").

[2]Section 4(f) states:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (1970).

[3]The appellants are the Stop H-3 Ass'n, the Moanalua Valley Community Ass'n, the Kaiku Village Community Ass'n, Life of the Land, the Moanalua Garden Foundation, all of which are non-profit organizations chartered for the purposes of opposing the construction of H-3 or preserving the Moanalua Valley, and several named individuals.

The National Wildlife Federation has filed a brief as *amicus curiae*, supporting the appellants.

contend that section 4(f) applies. The appellees,[4] who rely primarily on a determination by Hawaii State officials that Moanalua is only of "marginal" historic significance, argue that section 4(f) is inapplicable to the routing of H-3 through the Valley. Agreeing with the appellees, the District Court dissolved the injunctions that it had previously entered against construction of the highway.[5] *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102 (D. Hawaii 1974). We reverse.

I. *Statutory Background*

Public interest in preservation of the physical reminders of our Nation's past has prompted Congress to implement a strong national policy in favor of historic preservation. *See* 16 U.S.C. §§ 461, 470; 23 U.S.C. § 138; 49 U.S.C. § 1653(f) (1970). In section 4(f), Congress has determined that historic preservation should be given major consideration in connection with all proposed highway construction programs that are to receive financial aid from the federal government. The statute provides, in declaring national policy, that ". . . special effort should be made to preserve . . . historic sites." The statute further provides that before the Secretary of Transportation [hereinafter "the Secretary"] may approve the use of Federal funds for a highway that will "use" land from ". . . an historic site of national, State, or local significance as so determined by [the Federal, State, or local officials having jurisdiction thereof]," he must determine that no "feasible and prudent" alternative route exists. If there is no "feasible and prudent" alternative, the Secretary may approve the project only if there has been ". . .

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[4]Appellees are the Secretary of Transportation, the Hawaii Division Engineer for the Federal Highway Administration, and the Director of the Department of Transportation of the State of Hawaii.

[5]The prolonged history of the present controversy in the District Court is thoroughly and carefully reviewed in the District Court's Opinion. *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102, 1105-07 (D. Hawaii 1974).

We have hitherto issued an injunction designed, pending the disposition of this appeal, to prevent irreversible damage or destruction of the natural environment involved in the controversy. That injunction will remain in effect pending the eventual disposition of the appeal and the issuance of a new injunction by the District Court in conformity with our conclusion.

all possible planning to minimize harm . . ." to the historic site. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-13 (1971). The requirements are stringent. Congress clearly reflected its intent that there shall no longer be reckless, ill-considered, wanton desecration of natural sites significantly related to our country's heritage.

As one step toward implementing the national policy in furtherance of historic preservation, Congress, in the National Historic Preservation Act of 1966 [hereinafter "the NHPA"], 16 U.S.C. §§ 470 et seq. (1970), authorized the Secretary of the Interior

> to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register . . . .

16 U.S.C. § 470a(a)(1) (1970). The National Register, which includes properties of State and local, as well as national, historic significance, is intended to provide a ". . . convenient guide to properties which should be preserved . . . ." H.R. Rep. No. 1916, 89th Cong., 2d Sess., reproduced at 1966 U.S. Code Cong. & Admin. News 3307, 3310. In the NHPA, Congress also created the Advisory Council on Historic Preservation [hereinafter "the Advisory Council"], which is composed of the head officials of certain Federal agencies and other persons, appointed by the President, who have experience and interests in the field of historic preservation. 16 U.S.C. § 470i (1970). The Advisory Council is responsible for coordinating the historic preservation efforts of Federal agencies, state governments, and other organizations, and for making recommendations on matters pertaining to the protection and preservation of historic sites. 16 U.S.C. § 470j (1970).

To facilitate the identification of properties of State and local historic significance that qualify for inclusion in the National Register, the Secretary of the Interior has established certain "National Register Criteria." These Criteria broadly provide, in pertinent part, as follows:

> The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance

> that possess integrity of location, design, setting, materials, workmanship, feeling and association and:
>
> (1) That are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> (2) That are associated with the lives of persons significant in our past; or
>
> (3) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
>
> (4) That have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 800.10 (1975).

As defined in 36 C.F.R. § 800.3(f) (1975), the phrase "property eligible for inclusion in the National Register" means "any district, site, building, structure, or object which the Secretary of the Interior determines is likely to meet the National Register Criteria." For the purposes of NHPA, the regulations place property that is eligible for inclusion in the National Register on an equal footing with property that is actually listed in the Register. *See* 36 C.F.R. §§ 800.4(a)-(b) (1975).

II. *The Factual Setting*

As planned, H-3 would constitute the third and final segment of Hawaii's Interstate Highway System. It would be a six-lane, controlled-access highway extending for approximately fifteen miles across the southern half of Oahu, from near Pearl Harbor, on the Island's leeward side, across the Koolau Mountains, to the Kaneohe Marine Corps Air Station, on the windward side. Two conventional highways, the Pali and Likelike Highways, now provide trans-Koolau routes, but according to some official projections, these highways will soon be inadequate to serve the growing population on Oahu's windward side. The Moanalua Valley, which is privately owned, lies within Oahu's interior. H-3's projected route extends for approximately three miles along Moanalua's narrow floor. Within Moanalua, H-3 would pass

from within 100 to 200 feet of a large petroglyph rock that is known as Pohaku ka Luahine.[6]

In March, 1973, the Moanalua Gardens Foundation, a private, non-profit organization that is interested in Moanalua's preservation, nominated both the Valley and Pohaku ka Luahine for inclusion in the National Register. On July 23, 1973, the Interior Secretary named Pohaku ka Luahine to the National Register. 39 Fed. Reg. 6402, 6422 (1974). In October of 1973, the Interior Secretary's Advisory Board on National Parks, Historic Sites, Buildings and Monuments considered the historic significance of Moanalua Valley. The Board noted that much of the information concerning Moanalua's importance existed only within the private notebooks of oral traditions about the Valley that had been kept by the Valley's former owner, Gertrude Damon, and that since the Damon notebooks had never been released by the Damon estate, they had never been subjected to rigorous scrutiny. Consequently, while the Board believed that Moanalua had not been conclusively demonstrated to be of national historic significance, it concluded that "[h]istorical, cultural, and natural values combined with outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest."[7]

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[6]The Advisory Council states that

> Pohaku ka Luahine, a large boulder marked with petroglyphs, is located in the center of Moanalua Valley . . . . Pohaku ka Luahine is the largest free-standing petroglyph boulder on the island of Oahu and measures some 11′ x 8′ x 6′. There are only ten known petroglyph sites on the island of Oahu and only three such free-standing petroglyph boulders in the entire State.
>
> The rock shows 22 carvings which have been identified as petroglyphs (rock carvings) of human figures and bird men which range in sizes up to approximately 20 inches. All these were carved or pecked into the boulder surface with crude stone tools and endless hours of labor. The rock carving is described by the State Historic Preservation Officer as a "superb artistic expression of form in a medium of hard rock, using the crudest of tools and an unknown duration of labor . . . reason enough for ensuring the preservation of Pohaku ka Luahine." the ancient Hawaiians believed that natural phenomena—both animate and inanimate—possess spiritual form and being. In tradition, the rock is sacred.

Advisory Council, *Comments, supra* note 1.

[7]United States Department of the Interior, Memorandum from the Chairman, Advisory Bd. on Nat'l Parks, Historic Sites, Bldgs. & Monuments, to the Secretary of the Interior, October 3, 1973.

On May 8, 1974, the Interior Secretary published a Notice in the *Federal Register* that Moanalua, along with a number of other properties,

> may be eligible for inclusion in the National Register of Historic Places and are therefore entitled to protection under section 1(3) and section 2(b) of Executive Order 11593 and other applicable Federal legislation.

39 Fed. Reg. 16175-76 (1974).[8] Explaining his decision, then Interior Secretary Morton wrote in a letter to the Governor of Hawaii that while Moanalua was not of national historic significance, the Valley "possessed historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance."[9]

Thereafter, however, on August 5, 1974, the Hawaii Historic Places Review Board, a State body responsible for evaluating and nominating Hawaiian properties for inclusion in the National Register and for maintaining the Hawaii Register of Historic Places,[10] met concerning Moanalua and determined that the Valley was only of "marginal" local significance,[11] a classification that affords the Valley no protection from destruction.

Since Pohaku ka Luahine had already been named to the National Register, the Federal Highway Administrator, in compliance with 36 C.F.R. § 800.4 (1975), requested the Advisory

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[8]Section 1(3) of Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), 16 U.S.C. § 470 (Supp. I, 1971), requires Federal agencies to establish procedures for the protection and enhancement of non-federally owned historic sites. Section 2(b) of the Order pertains only to historic sites located on federally-owned land.

[9]Letter from Rogers C. B. Morton, Secretary of the Interior, to Governor Burns of Hawaii, May 13, 1974.

[10]Hawaii Rev. Stat. §§ 6-16.1, 6-16.2(11)(g) (1974 Supp.).

[11]The State's review board acted on the basis of a motion from one of its members that, in view of "deficiencies and apparent inaccuracies in historical information" and "inconsistencies in legendary material that has been presented," the Moanalua Valley "be given a marginal status." The same member stated that his motion would not preclude the later submission of additional information that might qualify the Valley for a higher classification. Minutes of the Meeting of the Hawaii Historic Places Review Board, August 5, 1974.

Council on Historic Preservation to comment concerning H-3's potential impact on the petroglyph rock. The Advisory Council met on August 6th and 7th, 1974. Because the Interior Secretary had recently determined that Moanalua was eligible for inclusion in the National Register, the Council broadened its review of H-3 from that requested by the Federal Highway Administrator to include the highway's potential impact on the Valley. The Advisory Council's report, copies of which were furnished to the Secretary of Transportation and to the Secretary of the Interior, concluded that both Pohaku ka Luahine and the Moanalua Valley possessed "historical, cultural, and archeological significance warranting their preservation."

Notwithstanding the Advisory Council's report and the Interior Secretary's published determination that Moanalua "may be eligible" for inclusion in the National Register, the Secretary of Transportation concluded, in September of 1974, that ". . . the Valley does not come under the provisions of Section 4(f)."[12]

III. *Discussion*

The District Court did not dispute the significance attached by the regulations to property that is eligible for inclusion in the National Register. The court wrote:

> [D]etermination by the secretary of interior that a property is eligible for inclusion in the National Register triggers all protections given to a property actually included until the eligibility is resolved.

389 F. Supp. at 1117. The court believed, however, that the Interior Secretary's May 8, 1974, *Federal Register* Notice, which stated that Moanalua "may be eligible" for inclusion in the Register, was not equivalent to a determination that the Valley "is eligible." We cannot accept this purported distinction.

As noted above, the regulations define "eligible for inclusion" in the National Register as meaning "likely to meet the National Register Criteria." We are absolutely unable to perceive any

[12]United States Dept. of Transportation, Federal Highway Administration, Memorandum from the Associate Administrator for Right-of-Way and Environment to the Regional Federal Highway Administrator, San Francisco, September 19, 1974.

meaningful distinction between "may be eligible" and "is likely to meet the criteria" for inclusion in the National Register. Furthermore, in his *Federal Register* Notice, the Interior Secretary specifically stated that the "may be eligible" designation entitled the listed properties to protection under the relevant Executive Order and "other applicable Federal legislation." This is the same protection that is provided under an "is eligible" determination. Finally, subsequent to the District Court's decision in this case, the Interior Secretary has resolved any remaining doubts by publishing a new *Federal Register* Notice concerning Moanalua. This Notice specifically states that the Valley has been determined "to be eligible for inclusion in the National Register." 40 Fed. Reg. 23906-07 (1975).

The District Court also concluded, and the appellees here contend, that since the Interior Secretary specifically determined Moanalua not to be of *national* historic significance, the question whether the Valley is significant in State or local history should be resolved solely by the Hawaii Historic Places Review Board. As previously noted, that Board has classified the Valley as being of only "marginal" historic significance. In our view, the District Court and the appellees have misconstrued section 4(f).

Section 4(f) applies to all properties that "the Federal, State, or local officials having jurisdiction thereof" determine to be of "national, State, or local significance." Under the NHPA, the Interior Secretary's "jurisdiction" to determine historic significance is not limited to properties of national importance.[13] In

[13]"Jurisdiction means the right to say and the power to act; and, as between agencies of the government, jurisdiction is the power of that particular agency to administer and enforce the law." *Carroll Vocational Institute v. United States*, 211 F.2d 539, 540 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954).

The NHPA authorizes the Secretary "to expand and maintain" the National Register, and the *only* requirement for a property's inclusion in the Register is that the property be "significant in *American* history, architecture, archeology, [or] culture." 16 U.S.C. Sec. 470a(a)(1) (emphasis added). The Act does not distinguish in any way between properties of "national" significance and those of "state or local" significance. There is nothing whatsoever in the Act or its legislative history to indicate that the Secretary may name some properties to the Register—those of importance in the history of a region, state, or locality—only after obtaining the concurrence of state and local authorities. For the purposes of the Register, properties of national, state, and local significance are treated

defining the National Register, the NHPA speaks in terms of properties "significant in American history, architecture, archeology, and culture," 16 U.S.C. § 470a(a)(1) (1970). To us, it appears beyond dispute that such significance can be found in properties that relate only to the history of a particular region, state, or locality. *See* 36 C.F.R. § 800.10 (1975); H.R. No. 1916, 89th Cong., 2d Sess. (1966) reproduced at 1966 U.S. Code Cong. & Admin. News 3307. Since the Interior Secretary is the only official authorized to name properties to the National Register, we have no doubt that he has "jurisdiction" to determine whether properties have state or local historic significance.

Under section 4(f)'s disjunctive language, if any of the officials having jurisdiction to determine that a site has national, State, or local historic significance, so decides then section 4(f) applies. Consequently, the Interior Secretary's determination that

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equally. They all are deemed significant in *American* history, and they should be. If it should be held that the Interior Secretary has no power to determine that properties have state or local historic significance, there would, in our view, be a virtual nullification of the NHPA and Section 4(f). Only properties of "national" significance would have any lasting protection from destruction. Whenever a city or state preferred a Federally-funded highway to an historic site, the local body could simply declare the site insignificant. Such a holding would be without precedent and would completely defeat Congress's clear attempt to protect such properties by passing the NHPA and 4(f).

The Advisory Council's regulations, upon which the appellees have relied, undoubtedly support our interpretation of the Secretary's power under the NHPA. Those regulations require *Federal agency officials* to request opinions from the Interior Secretary concerning a property's eligibility for inclusion in the Register. The Secretary's opinion is then said to be conclusive. 36 C.F.R. Sec. 800.4 (1975). The regulations do not require the concurrence of a state or local preservation official before the Secretary may conclude that a property is eligible for the Register.

Further, in our view, there has been nothing irregular or precipitous about the Interior Secretary's decision concerning the Valley with which we are concerned. The Secretary acted on the basis of an application submitted by the Moanalua Gardens Foundation, on forms provided by the Secretary for the purpose of making such nominations, and upon the expert recommendations of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments and the Advisory Council on Historic Preservation. Indeed, the Secretary's decision concerning the Valley followed essentially the same channels as did his determination concerning Pohaku ka Luahine, and not even the appellees have questioned the validity of the latter decision.

Moanalua is eligible for inclusion on the National Register as a site of local historic importance is not vitiated, and cannot be vitiated, by the State Review Board's finding that the Valley has only "marginal" significance. *See Named Individual Members v. Texas Highway Dept.*, 446 F.2d 1013, 1025-27 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) (section 4(f) applicable even though city officials had determined that city-owned parkland was of "secondary" importance to the construction of a freeway).[14]

In our court, the appellees have advanced three additional arguments which, if correct, might serve to validate the Transportation Secretary's decision that section 4(f) does not apply to the Moanalua Valley. First, taking a position different from that adopted by the District Court, the appellees assert that, even though the Secretary of the Interior may have determined Moanalua to be eligible for inclusion in the National Register, that determination does not constitute a finding of Moanalua's "historic significance" for the purposes of section 4(f). Appellees argue that section 4(f)'s application is narrowly restricted to properties that are actually included in the National Register or perhaps a similar state or local compilation of historic sites. We

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[14] *See also* Gray, *Section 4(f) of the Department of Transportation Act*, 32 Md. L. Rev. 327, 386 (1973).

Appellees contend that *Named Individual Members* is distinguishable from the instant appeal because there the city council did not find the park to be of *no* significance but only stated that the park was of "secondary" importance to the highway. We note that, somewhat similarly, the Hawaii Historic Places Review Board did not specifically find Moanalua to be of *no* historic significance. The Board classified the Valley as having "marginal" significance. *See* note 11 *supra*. As do the appellees here, the Highway Department in *Named Individual Members* argued that the local body's action constituted a finding of no significance. *Named Individual Members*, 446 F.2d at 1026.

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 620-23 (3d Cir. 1971), presented a different issue. There, the question was whether certain forest lands, owned by the State of Pennsylvania, had ever been set aside by the State as parkland or for other public recreational uses. The court held that the Secretary of Transportation was entitled to rely on an opinion letter from the State's Attorney General which stated that the lands had not been set aside for such purposes.

disagree.[15] In our view, the Interior Secretary's determination that Moanalua "is likely to meet" the established National Register Criteria constitutes a finding that the Valley has historic

[15]Section 4(f) focuses on Federal, not state or local, activities. It forbids the Secretary of Transportation from approving the use of Federal funds for highway projects not meeting the section's requirements. The statute has no application to purely state or local construction efforts. Section 4(f) begins by requiring, as a matter of national policy, that special effort be made to preserve historic sites. In view of the section's focus and obvious purpose, we simply cannot believe that either the Transportation Secretary or our court can ignore or avoid the Interior Secretary's pronouncement concerning the Valley.

We have concluded that under section 4(f) the Interior Secretary undoubtedly had the power, or jurisdiction, to investigate Moanalua, and while he decided that the Valley was not significant in the evolution of our history as a Nation, he nevertheless concluded that the Valley was likely of importance in our history as a people (i.e., significant in *American* history) and consequently declared the property eligible for the Register. His finding, when fitted into the mold of section 4(f), constitutes a finding of state or local significance. Congress's use of the plural "officials" in section 4(f) supports our interpretation of the statute's meaning. If the statute had read "as so determined by the Federal, State, or local *official* having jurisdiction thereof," it could then be interpreted as meaning that only the appropriate state official could determine that a site has state significance, etc. That is not what the statute says.

The legislative history of section 4(f) indicates that Congress inserted the language in question into the statute in order to broaden the statute's applicability. There is no hint in either the committee reports or the floor debates that Congress was seeking, by using the language, to give state and local officials power to vitiate Federal determinations that parklands or historic sites are significant. One of Congress's objectives was to require the Transportation Secretary to apply the statute whenever state or local officials declare a property significant, regardless of what Federal officials might think of the site. Congress's other goal was to guard against the situation wherein state or local officials decide that they would rather have a highway than a park or historic site and consequently declare the property to be insignificant. It is inconceivable that Congress intended that a local agency, by action or inaction, could disempower the Federal government, in a situation involving Federal funds, from preserving a site of historical *American* significance.

In the Senate's floor debate on the conference report pertaining to 4(f), Senator Yarborough asked Senator Randolph, who chaired the conference committee, the very question that concerns us:

> [Senator Yarborough] The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?
>
> MR. RANDOLPH. No; they could not ram it through, as the Senator has said.
>
> MR. YARBOROUGH. Do the Secretary of Transportation and the highways officials of the Federal Government have the power to apply this provision of the bill as written even though the local officials say such a site has no significance?
>
> MR. RANDOLPH. Under their power to approve plans, specifications, and estimates they can review such decisions.
>
> • • •
>
> MR. YARBOROUGH. • • • If you run a highway through a long, slender park . . . you do not have to pay any tax money for right-of-way. Thus the city council, hard pressed for money, is seeking to run a highway right through the center of one of the best parks in the State.
>
> MR. RANDOLPH. We are not going to allow that. [Indicating that the *Federal* power is transcendent.]

114 Cong. Rec. 24036-37 (1968).

The only commentator to consider the question also agrees with our interpretation of section 4(f):

> Historic sites present special problems. Unlike the other protected lands they need not be publicly owned. When they are not publicly owned, no presumption of a determination of significance can arise from the fact of public maintenance since normally only publicly owned property is publicly maintained. It is, on the other hand, customary for historic sites to be designated as such by someone such as a local or state landmarks commission, or by the United States Department of the Interior. Any such designation is presumably equivalent to a determination of significance for purposes of section 4(f).
>
> The determination may be made by any of the local, state or federal officials who can claim to have "jurisdiction thereof." For these purposes "jurisdiction" may refer to more than merely political authority, although governing bodies having general jurisdiction over the land in question would be able to trigger the application of the last sentence of Section 4(f) by declaring their determination of the significance of land which they wish to protect. An agency which is authorized to decide that properties have historic importance may be regarded as having "jurisdiction" over determinations of historic significance. Some properties, for instance, are listed by the Secretary of the Interior in the National Register of Historic Places.[120] *It is inconceivable that a National Register property could be regarded as ineligible for protection under section 4(f),*

significance. A contrary conclusion would exalt form and ignore substance.

In making this argument, appellees rely on two paragraphs of a letter written by former Interior Secretary Morton concerning his determination that Moanalua is eligible for inclusion in the National Register. Secretary Morton wrote that his determination of Moanalua's eligibility for listing in the Register did not trigger the requirements of section 2(b) of Executive Order 11593 and that the Department of Transportation remained ". . . solely responsible for determining which provisions, if any, of the . . . Department of Transportation Act . . . are applicable" to H-3.[16] We do not interpret Secretary Morton's letter as broadly as do the appellees. Section 2(b) of Executive Order 11593 establishes special requirements for the protection of historic sites that are located on lands owned by the United States. Since Moanalua is privately owned, the section, under its own terms, does not apply. Furthermore, there is no question that, as Secretary Morton stated, the Secretary of Transportation, not the Secretary of the Interior, is responsible for making the initial determination whether section 4(f) applies to a particular highway project.[17] In making that determination, however, the

regardless of whether it was considered "significant" by the local or state governing bodies having political jurisdiction over the property. A similar triggering function may inhere in a local or state historic society, if it has official status to designate landmarks. It might also be found in a state parks or recreation commissioner with respect to local parks which he has the authority to classify for state purposes, although they may not be under his administrative control. (Emphasis added)

Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327, 386 (1973).

[16]Letter, *supra* note 9.

[17]Our interpretation of Secretary Morton's letter is supported by a subsequent letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Acting Governor Ariyoshi of Hawaii. Secretary Reed's letter states, in pertinent part:

> As was explained in Secretary Morton's May 13 letter to Governor Burns, . . . our evaluation of the eligibility of Moanalua Valley for inclusion in the National Register was not made pursuant to Section 2(b) of Executive Order 11593, since the property is not in public ownership.
>
> • • •
>
> I would like to reiterate . . . that once we assist an agency in making an evaluation on a property, it is the agency's responsibility to assess its own legal obligations under Federal law. The Secretary of the Interior is not at liberty to exempt the Department of Transportation from that obligation.

Transportation Secretary must ascertain whether the project will use land from a site of historic significance, as determined by the Interior Secretary, or state or local historic preservation officials. Moreover, as here, the Transportation Secretary's decision is subject to judicial review.

Appellees next assert that the Interior Secretary's determination that Moanalua is eligible for inclusion in the National Register is invalid because the determination was not made in accordance with the procedures set forth in 36 C.F.R. § 800.4(a)(2) (1975). In pertinent part, that regulation reads:

> If [the Federal] Agency Official [responsible for a specific project] determines that a property [that will be adversely affected by the project] appears to meet the [National Register] Criteria, or if it is questionable whether the Criteria are met, the Agency Official shall request, in writing, an opinion from the Secretary of the Interior respecting the property's eligibility for inclusion in the National Register. The Secretary of the Interior's opinion . . . shall be conclusive for the purposes of these procedures.

Appellees contend that, since the Secretary of Transportation, who was the agency official responsible for H-3, did not request the Interior Secretary to determine whether Moanalua was eligible for inclusion in the National Register, the Interior Secretary had no authority to make such a determination.

Initially, we note that in making this argument appellees expose their own hands, some of which are not wholly clean. The regulation expressly and unambiguously provides that "if it is questionable" whether a property meets the National Register Criteria, the responsible agency official *shall* request the Interior Secretary's opinion. It is manifest that throughout 1974 it was at least "questionable" whether Moanalua was eligible for the National Register. The Valley had been nominated for the Register as early as March, 1973, and in 1974, the Valley was the subject of studies by the Advisory Council and the State's historic review board. On May 8, 1974, the Interior Secretary published an official notice that the Valley "may be eligible" for the National Register. The Transportation Secretary here seeks to avoid the effects of his own, wholly inexcusable, noncompliance with the regulation.

Furthermore, we find nothing in NHPA or the implementing regulations that would preclude the Interior Secretary from determining, on his own initiative, whether a property is eligible for inclusion in the National Register. Such could prove to be one of his most important and enduring contributions. The procedures set forth in 36 C.F.R. § 800.4 (1975) apply only to the special situation wherein a property not previously evaluated in the light of the National Register Criteria, is in imminent danger of alteration or destruction because of an on-going or proposed Federal project. Here, before the Interior Secretary acted, Moanalua had been nominated for inclusion in the register by the Moanalua Gardens Foundation and had been studied by the Secretary's Advisory Board on National Parks, Historic Sites, Buildings, and Monuments. We believe that the Interior Secretary's determination was well within his power under the Congressional authorization conferred by the NHPA.

Finally, appellees have suggested that the Transportation Secretary's review and approval of the Environmental Impact Statement (EIS) pertaining to H-3, which includes some material concerning Moanalua's historic significance, as well as discussions of several alternatives to H-3's proposed route through the Moanalua Valley,[18] constitutes compliance with section 4(f). Section 4(f) does not require the Transportation Secretary to set forth specific findings and reasons for approving a project that will use land from parks or historic sites.[19] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-19 (1971). Nevertheless, a court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind. *Id.* at 416. On the administrative record, the

[18]The alternatives discussed range from not building H-3 but instead improving, in various ways, the existing Pali and Likelike Highways, to placing H-3 along different routes across Oahu. Appellants contend that the City of Honolulu, containing a major portion of Oahu's population and undeniably having a vital interest in the trans-Koolua traffic flow, supports an alternative to the construction of H-3 which would add to the Likelike Highway a single, reversible-flow lane, to be used exclusively for public bus transportation.

[19]The Secretary's own procedures do, however, contemplate the preparation of combined "environmental impact/Section 4(f)" statements. *See* Dept. of Transportation, Federal Highway Administration, Policy and Procedure Memorandum 90-1, reproduced at 23 C.F.R. 15-26 (1974).

Secretary's consistent position was not that he had complied with section 4(f) but that the statute was altogether inapplicable. In the light of that consistently recorded position, it is not possible, with factual accuracy, to conclude that the Secretary evaluated H-3 with the explicit directives of 4(f) firmly in mind. Furthermore, we note that the EIS provides no evidence that the Secretary complied with section 4(f). While the document does contain some discussion of the advantages and disadvantages of several alternatives to H-3, as the roadway is now planned, the analyses do not attempt to demonstrate, or purport to establish, that each of the alternatives is not "feasible or prudent," as those terms are defined within the context of section 4(f). *Id.* at 411-13.

We conclude that the Secretary of the Interior has determined Moanalua to be eligible for inclusion in the National Register of Historic Places and that this determination entitles the Valley to the protections Congress has established for historic sites in section 4(f). We further conclude that the Secretary of Transportation did not comply with the requirements of section 4(f) before he approved Federal funding for H-3.

IV. *Other Issues*

Appellants contend that the Secretary also failed to comply with section 4(f) with respect to Pohaku ka Luahine, which, as we have heretofore noted, is included in the National Register. Because the petroglyph rock has once been moved and now rests a short distance from its original location, the District Court concluded that the rock, and its present surroundings, do not constitute an "historic site" for the purposes of section 4(f). 389 F. Supp. at 1116.

After careful consideration, we cannot escape the conclusion that Pohaku ka Luahine, and its immediate environs, qualify for protection under section 4(f). It is clear that the rock was originally located in the Valley, and it is inseparably linked to historic events that there occurred long since. Consequently, so long as the rock remains in the Valley, even though it may stand a few feet from its original location, we believe that it forms the basis for an historic site. Further, we believe that H-3, which will pass near the rock, will "use" land from that historic site. *See Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (a proposed highway that

would encircle a public campground would "use" that campground).

In the particular circumstances of this case, however, Pohaku ka Luahine's fate, like its historic significance, is linked to that of the Moanalua Valley. If the Secretary validly determines that there is no "feasible and prudent" alternative to the alleged desecration of the Valley, there will be no such alternative to the use of the petroglyph rock. Consequently, if the Secretary makes such a determination, the 4(f) inquiry with respect to the rock must be whether there has been "all possible planning to minimize harm."

Appellants have presented three other issues to us. They contend that the EIS for H-3 and the 4(f) statement pertaining to the Pali Golf Course are inadequate and that the H-3 project is not grounded in a continuing comprehensive State and local transportation planning process, as is required by 23 U.S.C. § 134(a) (1970). Because of our decision as to Moanalua Valley and Pohaku ka Luahine, we believe that we should not consider these issues at this time. It is altogether possible that future developments will moot these issues. In the event that the Secretary does conclude that there is no "feasible and prudent" alternative to the routing of a multi-lane highway through Moanalua, the District Court will reconsider that conclusion and these other issues in the light of all information that will then be available.

The District Court's Order dissolving the injunctions against construction of H-3 is reversed. On remand, the District Court will enjoin construction of the highway until such time that the Secretary can demonstrate his full compliance with section 4(f) as the statute applies to Moanalua Valley and Pohaku ka Luahine and has made a determination in harmony with the statutory requirements.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, Concurring and Dissenting:

I concur that this case must be remanded but cannot agree with the route the majority takes to that end, nor with what it requires. The most troublesome issue for me in this case pertains to the petroglyph rock but since the majority reverses largely on the basis

of the protection supposedly accorded the Moanalua Valley, I will treat those issues first.

I. *Moanalua Valley*

While all who legitimately attempt to preserve the beauty and historical significance of our environment are to be applauded, our responsibility as judges, as I see it, is to determine whether the congressionally mandated procedures for protection require halting an approved construction project. Our review, thus, is a narrow one, not broadened by policy considerations we might inject if we were the Congress. Therefore, the sole issue in this case with respect to the valley is whether it is an historic site of national, state or local significance as determined by the federal, state or local officials having jurisdiction thereof. If so, construction of H-3 must be enjoined pending the special findings required of the Secretary of Transportation by the Department of Transportation Act of 1966 section 4(f), as amended, 49 U.S.C. § 1653(f) (Supp. 1975), and the Federal-Aid Highway Act of 1966 section 15(a), as amended, 23 U.S.C. § 138 (Supp. 1975) (the two sections are virtually identical and will hereafter be referred to together as "section 4(f)"). If not, the district court's denial of an injunction on this ground must be affirmed.

The facts are not seriously in dispute: the Secretary of the Interior has determined that the valley "may be eligible" for inclusion on the National Register of Historic Places; the Hawaii Historic Places Review Board determined that the valley had only "marginal" significance, an equivalent term for "no" significance, and was therefore not entitled to any protection under state historic site preservation laws. *See* Hawaii Rev. Stat. § 6-1 *et seq.* (1968, Supp. 1973).

The plaintiffs-appellants (appellants) assert a novel theory, rejected by the district court, which involves the use of a different statute out of context to find the bootstrap necessary to inject the Secretary of the Interior as the decision maker pursuant to section 4(f). The problem they must overcome is that the valley has no national historic significance. The local authorities did not find that it had local historic significance. Thus, they must show (1) the Secretary of the Interior found the valley had local historic significance and (2) he is an official allowed to make such a finding pursuant to section 4(f). Therefore, they pose the argument that

the Secretary of the Interior has authority under the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (1974) (NHPA), to determine the state and local historic significance of places in passing on nominations to the National Register and is therefore one of the officials having jurisdiction over the valley whose determination of historic significance triggers section 4(f) protections. This is the argument relied upon by the majority in reversing the decision of the district court and with which I cannot agree.

Turning to the statute appellants claim injects the Secretary of the Interior into section 4(f) decisions, I conclude that the Secretary had no authority based upon the facts of this case to place the valley on the National Register. Thus, even if appellants' theory were accepted that the NHPA in some fashion allows the Secretary of the Interior to decide a site has local historic significance, it would avail them nothing based upon the record in this case. Section 101(a)(1) of the NHPA, 16 U.S.C. § 470(a)(1), provides that the Secretary of the Interior is "to expand and maintain" the National Register. The Act does not expressly specify the procedure for determining which properties are to be listed on the National Register but a reasonable interpretation of all the available sources indicates that properties of state and local historic significance are not to be listed by the Secretary of the Interior unilaterally without an initial determination of significance by state officials.

Supporting this view, section 101(a)(1) of the NHPA provides that the Secretary of the Interior shall grant funds to the states for statewide historic surveys to be conducted *by the states*. Executive Order 11593 promulgated to implement the NHPA provides that the Secretary of the Interior's role under the Act is merely to encourage state and local officials to nominate federally-owned properties to the National Register, Executive Order 11593 § 3(a), 3 C.F.R. 154 (Supp. 1971), 16 U.S.C. § 470 (1974), and to advise federal agencies in the identification of historic sites. *Id.* § 3(f).

Of most significance is the notice published in the Federal Register by the Department of the Interior for the purpose of increasing "awareness of the means by which properties of State and local historical significance may be nominated for placement in the National Register . . . ." 39 Fed. Reg. 6402 (1974). It is critical to realize that this notice states that while under prior law (specifically, the Historic Sites Act of 1935, 16 U.S.C. §§ 461 *et seq.*) the

National Register included only nationally significant properties which were few in number, the NHPA "provides a means for *States* to nominate properties of *State and local significance* for placement in the National Register." 39 Fed. Reg. 6402 (1974) (emphasis added). The notice then sets forth the procedures for nominations by state officials and the criteria to be used by the National Park Service in reviewing the nominations. 39 Fed. Reg. 6403-04 (1974). Nowhere in the NHPA, the Executive Order, or the applicable regulations is the Secretary of the Interior given the authority unilaterally to determine that a property has state or local historic significance.

The appellants place great emphasis on regulations promulgated by the Advisory Council on Historic Preservation, an advisory body created by the NHPA, 16 U.S.C. § 470i (1974). These regulations arguably confer some authority on the Secretary of the Interior to determine the state and local historic significance of properties but the regulations also restrict his part in the decision-making process and give no assistance to appellants' contention that the Secretary of the Interior possesses unilateral decision-making authority. The regulations provide that even though the NHPA protects only properties actually listed on the National Register, properties merely "eligible" for listing should also be protected. To this end, the "Agency Official" of the federal agency contemplating an undertaking (here, the Secretary of Transportation) is given the burden of identifying the properties within the undertaking's potential environmental impact which are listed or eligible for listing on the National Register. Only if, after consulting with the appropriate state historic preservation officer and applying the National Register criteria set for in the regulations, the agency official determines that a property "appears to meet the Criteria, or if it is questionable whether the Criteria are met," is he required to "request, in writing, an opinion from the Secretary of the Interior respecting the property's eligibility for inclusion in the National Register." 36 C.F.R. § 800.4(a)(2) (Supp. 1975).

The Governor of Hawaii has designated the chairman of the state Department of Land and Natural Resources as the state liaison officer responsible for state activities under the NHPA. *See* 39 Fed. Reg. 6402 (1974). The Federal Highway Department Division Engineer consulted this official concerning the eligibility of the valley for listing on the National Register as a property of

state or local significance and was informed by letter of March 6, 1974, that the valley clearly did not meet the National Register criteria.

Appellants nevertheless argue that in this case the valley's eligibility for National Register listing was at least "questionable," especially in light of the Secretary of the Interior's published determination that the valley "may be eligible" for listing. They claim that in these circumstances, the regulations clearly give the Secretary of the Interior "jurisdiction" within the meaning of section 4(f) to determine the valley's local (not national) historic significance. But the regulations clearly put the initial burden of determining the eligibility of a site for National Register listing on the agency supervising the undertaking, here the Department of Transportation, and give the Secretary of the Interior no authority to make any determination until he has been asked for an opinion. Here the Secretary of Transportation consulted the appropriate state official who advised that the valley clearly was not eligible for listing. The Transportation Secretary never requested a ruling from the Secretary of the Interior and the Secretary of the Interior therefore had no authority under the regulations to make any determination with respect to the significance of the valley. It can be properly inferred that the Secretary of the Interior realized this was true when, in his letter to the Governor of the State of Hawaii, he deferred to the Secretary of Transportation's exclusive authority to make any such determination.[1]

The majority does not confront this point directly but instead asserts that the failure of the Secretary of Transportation to seek the Secretary of the Interior's opinion was "wholly inexcusable."

[1]The letter stated in part:

> In response to a recent request from the Council, we provided such an evaluation of Moanalua Valley. It reflected the consensus of the Advisory Board and the professional judgment of the National Park Service that, although not of national significance, Moanalua Valley possessed historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance.
>
> In making this assessment, we have discharged a responsibility vested in the Secretary of the Interior by the National Historic Preservation Act and section 3(f) of Executive Order 11593. I want to make clear that this assessment does not constitute a determination of prospective eligibility for National Register designation pursuant to section 2(b) of the Executive Order, and does not, therefore, have the effect of requiring consultation on this matter between the Secretary of Transportation and the Advisory Council on Historic Preservation.
>
> The Department of Transportation is, of course, solely responsible for determining which provisions, if any, of the Executive Order, the National Historic Preservation Act, the Department of Transportation Act, and the National Environmental Policy Act are applicable to this undertaking. I understand that pending litigation on at least some of these issues must be favorably resolved before work on the highway can proceed.
>
> I hope this letter has clarified the responsibilities and actions of the Interior Department in relation to those of the Advisory Council and the Department of Transportation.

They argue that the valley's significance was at least "questionable" in light of its "nomination" to the National Register by the private Moanalua Gardens Foundation[2] and the studies of the

[2]The majority states at page 5, *ante*, that both the petroglyph rock and the valley were nominated by the Moanalua Gardens Foundation for National Register listing. The majority then argues in footnote 13, *ante*, that there was nothing irregular in the nomination of the valley and that the procedure was "essentially" the same as that leading to the National Register listing of the petroglyph rock, the validity of which the appellees do not challenge.

While it is true that the valley was nominated by the Moanalua Gardens Foundation, the petroglyph rock was in fact nominated by Hawaii's state Department of Land and Natural Resources. This not only undercuts the argument of the majority but is significant evidence supporting the position taken in this concurring and dissenting opinion.

Further, the National Park Service form 10-300 (July 1969), upon which both nominations were made, includes an item 12, "State Liaison Officer Certification," which reads in part: "As the designated State Liaison Officer for the National Historic Preservation Act of 1966 (Public Law 89-665), I hereby nominate this property for inclusion in the National Register and certify that it has been evaluated according to the criteria and procedures set forth by the National Park Service." The inclusion of this item on the form is consistent with my reading of the NHPA as limiting the Interior Secretary's statutory duty "to expand and maintain" the National Register to evaluation of nominations made in the first instance by designated state officials. Significantly, this item is at least partially filled in on the form nominating the petroglyph rock, including a designation of the title of the certifying officer as "Chairman and Member Board of Land and Natural Resources"; it is left completely blank on the form "nominating" the valley. That the Interior Secretary appreciated the significance of this difference no doubt explains why he placed the rock on the National Register, 39 Fed. Reg. 6422 (1974), but determined only that the valley "may be eligible" for such listing. *Id.* at 16175-76.

valley by the state's Historic Places Review Board and the national Advisory Council. Yet the local historic significance of the valley was not determined by the Advisory Council or the Secretary of the Interior until 1974, after the determination by the chairman of the state Department of Land and Natural Resources that the valley was clearly not eligible for National Register listing, after design approval of H-3 by the FHWA, and after the original complaint in this action was filed. Moreover, appellants have never alleged an abuse of discretion by the Secretary of Transportation in not seeking the Secretary of the Interior's opinion. In these circumstances, especially in light of the determination of no historic significance by the state official whom the Secretary of Transportation is required to consult by the very regulation relied upon by appellants, the propriety of the failure of the Secretary of Transportation to seek the Interior Secretary's opinion should not be in issue.

However, even if appellants were correct, which they were not, and the Secretary of the Interior could be said to have "jurisdiction" of the valley pursuant to this regulation, the regulation itself does not apply to this case. The regulations were issued under the authority of Executive Order 11593 § 1(3), 3 C.F.R. 154 (Supp. 1971), 16 U.S.C. § 470 (1974), which requires federal agencies to establish procedures to insure that federal activities contribute to the preservation and enhancement of non-federally owned historic sites. Thus, the Advisory Council in promulgating the regulations merely "*recommends* that Federal Agencies use these procedures as a guide in the development . . . of their [own] required internal procedures." 36 C.F.R. § 800.1(b)(2) (Supp. 1975) (emphasis added).

In this regard, the Department of Transportation had adopted its own internal procedures for historic preservation more than a year earlier. Policy and Procedure Memorandum 90-1, 37 Fed. Reg. 21809, 21812 (1972), 23 C.F.R. Pt. 1, App. A (Supp. 1974). These procedures afforded NHPA protections only to properties actually listed on the National Register and not to those merely "eligible" for listing. The procedures gave the Secretary of the Interior no role in the identification of historic properties. The same memorandum also prescribed procedures for compliance with section 4(f). Specifically, "[t]he HA [in this case, the state highway department] shall request a determination of significance from the

section 4(f) lands agency . . . ." *Id.* ¶ 6(c)(1). The memorandum does not elaborate on the identity of the "section 4(f) lands agency" but use of the singular "agency" negates appellants' argument for concurrent "jurisdiction" of the Secretary of the Interior over historic sites of local significance.

On December 2, 1974, the Department of Transportation promulgated new regulations which implicitly afford NHPA protections to properties merely eligible for listing on the National Register by requiring that the section 4(f) statement (if any) include evidence that the Advisory Council's recommended procedures have been followed for such properties. 23 C.F.R. § 771.19(b) (Supp. 1975). Significantly, however, the new regulations also provide that "[a] section 4(f) statement is not required when the Federal, State or local official having jurisdiction over a park, recreation area, refuge or historic site determines that it is not significant" (*id.* § 771.19(c)), apparently even if the property has been determined to be "eligible" for National Register listing by the Secretary of the Interior. To sum up, the Secretary of the Interior has no authority to make a unilateral determination of the local significance of an historic site for section 4(f) purposes.

The majority's final argument is that even if the Secretary of the Interior is not expressly given the authority unilaterally to determine a site's local historic significance by any of the statutes, orders, or regulations cited by the appellants, none of those provisions preclude such power. I find no authority for nor could I endorse a doctrine that the Secretary of the Interior has all powers under the NHPA not expressly withheld from him. In my judgment, such a philosophy has extreme potential dangers. But even if I were to concede that the Secretary of the Interior has such authority, I do not think that he would be an official with jurisdiction to determine local historic significance of the valley within the meaning of section 4(f).

Turning then to section 4(f) itself, it was originally enacted in 1966 as part of the Department of Transportation Act. The section provided in part: "[T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless . . . ." Act of October 15, 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 934. This section and section 15(a)

of the Federal-Aid Highway Act of 1966, which had been similar, were amended in 1968 so as to be virtually identical. Act of August 23, 1968, Pub. L. No. 90-495, § 18, 82 Stat. 823. The new statute provides, with the major 1968 additions emphasized:

> (f) *It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.* The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. *After August 23, 1968,* the Secretary shall not approve any program or project which requires the use of any *publicly owned* land from a public park, recreation area, or wildlife and waterfowl refuge *of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof,* or *any land* from an historic site *of national, State, or local significance as so determined by such officials* unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (Supp. 1975) (referred to herein as "section 4(f)"). I think it clear from an examination of the language of the statute itself and the legislative history that whatever authority the Secretary of the Interior may have with respect to the valley under the NHPA, he is not an official with jurisdiction of the valley within the meaning of this statute.

Before the 1968 amendment, the statute appeared to leave to the Secretary of Transportation, as the official who was to approve project or program plans, the determination whether land at issue indeed was a public park, recreation area, wildlife refuge, or historic site. *See Pennsylvania Environmental Council, Inc. v. Bartlett,* 454 F.2d 613, 621-22 (3d Cir. 1971). But the statute as amended in 1968 requires that a protected historic site have "national, State, or local significance" as determined by "the Federal,

State, or local officials having jurisdiction thereof." While the language may not be crystal clear, I think that the determination of the state or local historic significance of a privately-owned site such as the valley must be made by the state or local officials in charge of state or local historic preservation activities. *See Pennsylvania Environmental Council, Inc. v. Bartlett, supra,* 454 F.2d at 622-23; *Environmental Defense Fund v. Brinegar,* 6 E.R.C. 1577, 1593-94 (E.D. Pa. 1974); *Lathan v. Volpe,* 350 F. Supp. 262, 267-68 (W.D. Wash. 1972), *vacated in part on other grounds sub nom. Lathan v. Brinegar,* 506 F.2d 677 (9th Cir. 1974) (en banc).[3]

Appellants argue that the use by Congress of the plural "such officials" in section 4(f) demonstrates congressional recognition of the concurrent power of local and federal officials to determine the local significance of historic sites. However, the use of the plural could just as easily be an accommodation to state laws which may lodge historical preservation functions in more than one official. Further, a logical reading of that part of section 4(f) in the context of the question before us resolves the issue against appellants. The statute prohibits the Secretary of Transportation from approving any project "which requires the use of any publicly owned land from a public park, recreation area, or wildlife and

[3]Appellants assert, on the other hand, that a declaration by local officials of a preference for a highway through a locally significant site does not obviate the need for the special findings required by section 4(f) before the highway can be built. Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1025-27 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *reversing* 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970). These cases are distinguishable in that the sites involved were admittedly "of local significance"; the local officials nevertheless declared their preference for a highway. In this case, on the other hand, the local officials have not declared a preference for a highway through a locally significant site; they have determined that the site is not locally significant. The distinction is important because there are much greater local political constraints against declaring a locally important site "insignificant" than against declaring a preference for a highway. *See* Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327, 384-85 (1973). Finally, it is noteworthy that the appellants here have not directly attacked the local officials' determination that the valley is not significant as an abuse of discretion or against the law. Their only contention is that the Secretary of the Interior's contrary determination is enough to trigger the section 4(f) protections, a contention which I would reject.

waterfowl refuge [in three categories, i.e.] of national, State, or local significance as determined by [three autonomous groups, i.e.] the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless . . . ." Applying logical canons of construction to this statute, it declares that each category of property is tied to its appropriate overseer insofar as jurisdiction and the rendering of at least the initial determination of significance are concerned. Each of the three categories is thus tied, respectively, to each of the designated officials; i.e., federal officials to property of "national" significance; property having state significance, to state officials; and property of local significance, to local officials. If this is true, the "as so determined by such officials" clause in section 4(f) would seem to me to require in this case a determination by the local (or perhaps state) officials as a condition precedent to bringing the section 4(f) protections into play.

However, whatever ambiguity may appear from the language of the statute is resolved by the legislative history. The committee report accompanying the Senate version of the Federal-Aid Highway Act of 1968 (which included the amendments under discussion here) noted: "The importance of the involvement of local officials in route selection, the public hearing process, and the resolution and establishment of community goals and objectives cannot be overstated. . . . With respect to a number of proposals contained in S. 3418, as reported, local authorities would be vital participants." S. Rep. No. 1340, 90th Cong., 2d Sess. 11 (1968), *reprinted in* 3 U.S.C. Cong. & Ad. News 3482, 3492 (1968). While this passage of the report does not refer specifically to the role of local officials in determining the local historic significance of sites under section 4(f), the intent of Congress is made clear by an exchange on the floor of the Senate during discussion of the bill reported by the Conference Committee where the amendment of section 4(f) provoked one of the longest discussions. Senator Randolph, the leader of the Senate conferees, during a lengthy discussion provoked by the amendment of section 4(f) explained the theory thusly: "[I]t is important that the local people have a leadership. They can properly understand the importance of places that someone from afar may not realize. The importance of such places can *only* be understood by local people." 114 Cong. Rec. 24029 (1968)

(emphasis added). Some of the Senators, particularly Senator Yarborough of Texas who remembered the Brackenridge-Olmos Park lands case, *see Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972), voiced the concern that local officials might determine that a park important to the local people was not "significant" within the meaning of section 4(f) so as to avoid the section 4(f) protections and the possibility of having to obtain a costly privately-owned alternate right-of-way. Senator Randolph's response to this concern was not the contention asserted by the appellants that the determination of local significance is not *exclusively* delegated to local officials by section 4(f). Indeed, he seemed to concede the exclusive authority of local officials by answering that the only protection against local approval of the use of parklands and historic sites was the Secretary of Transportation's authority under Title 23 to use his independent judgment in approving or disapproving highway construction plans. 114 Cong. Rec. 24036-37 (1968).

Senator Randolph's interpretation of the amendment concerning the sole federal check on local determination of historical nonsignificance finds support in the most recent regulations promulgated by the Department of Transportation pertaining to section 4(f) procedures. The regulations provide that no section 4(f) statement is required where the official with jurisdiction determines that the property is not significant. But in that case, the regulations require: "The FHWA [Federal Highway Administration] Division Engineer shall review the agency's non-significance determination to assure himself of the reasonableness of such determinations." 23 C.F.R. § 771.19(e) (Supp. 1975).

Thus, there can be no reasonable doubt, in my judgment, that Congress did not intend the Secretary of the Interior to have authority to decide unilaterally whether local sites have historical significance. On the contrary, the legislative history of section 4(f) is clear: the protections extend to an historic site of state or local significance only if the state or local officials with authority to pass on historic values determine that a given site is significant. In this case, the state officials with such authority did not determine that the valley had historic significance, the Secretary of Transportation did not exercise his independent veto power and, therefore, no section 4(f) findings were required.

II. *The Petroglyph Rock*

The petroglyph rock presents a different problem. The rock was placed on the National Register of Historic Places by the Secretary of the Interior after being nominated by the state Historic Places Review Board. The Board's nomination of the rock should be considered a finding of local historic significance by state officials with jurisdiction so as to trigger section 4(f) protections, assuming the other prerequisites are met.

Besides "significance," section 4(f) requires that the project "use" the historic site. The appellants alleged that H-3 would use the rock but the trial court made no findings on the issue and the point has not been argued during this appeal. *Brooks v. Volpe,* 460 F.2d 1193, 1194 (9th Cir. 1972), requires a broad construction of the word "use" so as to require section 4(f) statements wherever there is a substantial question of adverse impact. In that case, we held that the encirclement of a public campground by the challenged highway was a "use" of the campground. In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,* 362 F. Supp. 627, 638-39 (D. Vt. 1973), *aff'd,* 508 F.2d 927 (2d Cir. 1974), the court held that construction of a highway adjacent to a potential wilderness area was a "use" of that land.

In both of these cases, however, the significance of the recreation area depended on its solitude and isolation which would be jeopardized by construction of the highway. In this case, on the other hand, the significance of the rock is primarily as an object of viewing and study which could actually be facilitated by the construction of the highway. This view is supported by the findings of the state Historic Places Review Board. The application for listing on the National Register attached great significance to the rock itself but did not give any weight to the rock's particular location. On the contrary, the Board has found that the valley is only of "marginal" significance.

On the record before us, I doubt whether the appellants have established that the highway would "use" the rock within the meaning of section 4(f). Since the trial court made no findings on the issue, however, I would remand the case for a hearing and a determination by the district judge. Although we have held that the determination of "use" of a site by a highway is a question of law and not fact, *Brooks v. Volpe, supra,* 460 F.2d at 1194, we cannot

resolve the legal issue in the absence of evidence and findings on the effect of the highway on the rock.

I am not of the opinion that any of the other issues raised by the appellants require reversal and therefore would reverse and remand only to the limited extent indicated above.

APPENDIX B

Order of United States Court of Appeals for the Ninth Circuit Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-1552

FILED MAY 21 1976

STOP H-3 ASSOCIATION, *et al.*, and
HUI MALAMA AINA O KO'OLAU, *et al.*,

Appellants,

—V.—

WILLIAM T. COLEMAN, JR., as Secretary of the United States Department of Transportation, *et al.*,

Appellees.

ORDER

Before:

KOELSCH, ELY and WALLACE,

Circuit Judges.

Of the judges constituting the panel originally concerned with the subject case (Koelsch, Ely, and Wallace), Judges Koelsch and Ely have voted to deny the Petition for Rehearing. Judge Wallace would grant panel rehearing. The

three judges have voted unanimously to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

APPENDIX C

Opinion of United States District Court for the District of Hawaii

UNITED STATES DISTRICT COURT,

D. HAWAII.

Dec. 26, 1974.

Civ. Nos. 72-3606, 73-3794.

STOP H-3 ASSOCIATION a Hawaiian non-profit corporation, *et al.*,

Plaintiffs,

—v.—

CLAUDE S. BRINEGAR, Individually and as Secretary of the United States Department of Transportation, *et al.*,

Defendants.

HUI MALAMA AINA O KO'OLAU *et al.*,

Plaintiffs,

—v.—

CLAUDE BRINEGAR, Individually and as Secretary of Transportation, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SAMUEL P. KING, *Chief Judge.*

STATEMENT OF THE CASE

This case involves the construction of (T)H-3, a defense interstate highway on the island of Oahu, State of Hawaii.

The original complaint in Civil No. 72-3606 was filed on July 19, 1972. After several amendments, a consolidated complaint entitled Compilation of Complaint for Injunctive and Declaratory Relief, as Amended and Supplemented, was filed and received in evidence on December 3, 1974, as Court's Exhibit 2. Consolidated answers were filed by the federal defendants on December 3, 1974, and by the state defendants on December 4, 1974. The consolidated complaint set forth seven causes of action. On December 10, 1974, the complaint was amended to add an eighth cause of action. This was duly answered by the state defendants on December 18, 1974, and by the federal defendants on December 23, 1974.

A separate complaint, Civil No. 73–3794, was filed on April 9, 1973, by additional plaintiffs against the same defendants with relation to the same highway. Inasmuch as this complaint included issues not raised in Civil No. 72–3606, an earlier attempt on March 16, 1973, to intervene, was denied, and the two actions were not at first consolidated. By stipulation entered December 3, 1974, the plaintiffs in Civil No. 73–3794 agreed to a dismissal of certain of their claims, rendering the issues in both actions identical, and the two suits were consolidated for trial on the merits. Answers to this complaint were duly filed by the state defendants on May 1, 1973, and by the federal defendants on June 7, 1973.

At the time of the filing of the complaint in Civil No. 72–3606, one of the issues raised was that the defendants had failed to comply with Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)). The Secretary of Transportation took the same position. He had instructed the state authorities to provide additional information. Thus there was no approved environmental impact statement upon which to base the processing of federal-aid funds for this highway. On the other hand, two segments of the highway were already under construction, and the defendants took the position that, in applying NEPA to this project, further construction on these two segments should not be enjoined.

There being something to be said on both sides, the parties sensibly reached an agreement which was filed on September 15, 1972, in the form of a stipulation approved and ordered by the court. The stipulation permitted continued construction of the Halawa Interchange and that segment of the highway extending from (but not including) the Halekou Interchange to the Kaneohe Marine Corps Air Station, and enjoined all other construction, further acquisition of right of way, and further letting of contracts on the rest of the highway, which was identified as the Moanalua-Haiku Segment. After approval of an EIS, the adequacy of the EIS and all other issues still unresolved would be litigated.

On September 22, 1972, defendants moved for an order requiring plaintiffs to furnish security in the amount of $337,300 or such other amount as the court should deem proper. A bond of $100 was ordered.

Defendants then sought a "clarification" of the stipulation to permit the completion of test borings and the continuation of design work, both with respect to the Moanalua-Haiku Segment. Test borings which had been physically begun were allowed to be completed, but the expenditure of funds for further test borings or design work was specifically enjoined by decision and order entered October 18, 1972. Stop H–3 Association v. Volpe, 349 F.Supp. 1047 (D. Hawaii 1972).

These issues were reargued on defendants' application filed on October 24, 1972, for stay of the injunction pending appeal. The motion for a stay was denied on December 18, 1972. Stop H–3 Association v. Volpe, 353 F.Supp. 14 (D. Hawaii 1972).

On December 11, 1972, defendants moved for an amendment to allow further test borings under an existing contract. On December 19, 1972, the motion was denied.

On March 1, 1973, plaintiffs filed a motion for partial summary judgment compelling new hearings pursuant to 23 U.S.C. § 128. On May 3, 1973, plaintiffs filed a motion for partial summary judgment ordering the "Preface" to the EIS to be circulated for comment. On July 6, 1973, the court entered findings of fact, conclusions of law, and an order requiring the so-called preface to be circulated and reviewed in accordance with the provisions of FHWA PPM 90–1, paragraph 6, and of Section 102(2)(C) of NEPA. On July 13, 1973, the court entered statement of facts, conclusions of law, and an order requiring new public hearings complying with 23 U.S.C. § 128(a) and (b), as amended in 1968 and in 1970, with FHWA PPM 20–8, and with 23 C.F.R. § 790, as amended through May 9, 1973.

On April 22, 1974, defendants filed a motion for an "interpretation" of the stipulation and injunction of September 15, 1972, to exclude from the terms of the injunction certain portions of the highway segment between the

Kaneohe Marine Corps Air Station and the Halekou Interchange. It was clear that the defendants sought not an "interpretation" but an amendment. The motion was denied on May 8, 1974.

During these past two years, considerable activity was taking place. New section 128 hearings were held. The preface, and certain appendices resulting from the hearings, were circulated for review. The construction of the highway became a political issue in the 1974 gubernatorial campaign. The valley through which the highway was to be built was considered for inclusion in the National Register of Historic Sites and other aspects of 23 U.S.C. § 138 (49 U.S.C. § 1653(f)) and of 16 U.S.C. § 470, were explored.

Finally on October 29, 1974, defendants filed a motion for an order dissolving the existing injunction on the ground that all requirements preliminary to the federal action contemplated had been met. On November 15, 1974, the court granted defendants' motion for a trial on the merits as to all causes of action in Civil No. 72–3606, to commence December 3, 1974. As noted earlier, Civil No. 73–3794 was later consolidated with Civil No. 72–3606 for trial on the merits. In pretrial it was agreed that defendants would proceed first to put on their evidence showing compliance with all statutes, regulations, orders, policies and procedures referred to by plaintiffs in their complaints; that plaintiffs would then put on their evidence as to noncompliance or faulty compliance; and that either side would then put on whatever rebuttal and sur-rebuttal was appropriate, all without altering the burden of persuasion. Trial on the merits was held as scheduled, and the matter is now before me for decision.

ISSUES

Plaintiffs' consolidated complaint as amended in 72–3606 contains eight causes of action. Plaintiffs' complaint in 73–3794 raises essentially the same issues as are raised in the first, third, and fourth causes of action in 72–3606, with special emphasis on the social and economic effects of the project on the residents of Kahaluu. These causes of action assert claims as follows:

(A) Non-compliance with NEPA.

(B) Non-compliance with 23 U.S.C. § 128 and PPM 20–8, relating to public hearings.

(C) Non-compliance with 23 U.S.C. § 134, relating to the continuing comprehensive cooperative process for transportation planning in urban areas.

(D) Non-compliance with those provisions of the Charter of the City and County of Honolulu relating to the general plan.

(E) Non-compliance with 49 U.S.C. § 1653(f) and 23 U.S.C. § 138, relating to preservation of parklands.

(F) Non-compliance with 23 U.S.C. § 109(a) and (j), relating to air quality.

(G) Non-compliance with the National Historic Preservation Act.

(H) Non-compliance with DOT I.M. 50–3–71, relating to urban transportation planning as it affects project approval.

The original complaint having been filed in July 1972, and the case being submitted on the merits in December 1974, certain intervening events have rendered some of these causes of action moot at this time. Plaintiffs acknowledged this state of the record upon completion of the trial by withdrawing their second cause of action relating to public hearings pursuant to 23 U.S.C. § 128 and PPM 20–8, the second alternative claim to their third cause of action relating to transportation planning, and their sixth cause of action relating to air quality.

A. NEPA

Plaintiffs argue that defendants failed to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4347, in eight specific particulars as follows:

1. The EIS fails to discuss adequately the need for the highway.

2. The EIS fails to reflect FHWA compliance with the National Historic Preservation Act of 1966.

3. The EIS fails to describe adequately the impact of the project on historical resources.

4. The EIS fails to adopt the findings of various federal agencies who have expertise in determining the impact of the project.

5. The EIS fails to describe adequately the secondary effects of the project.

6. The EIS fails to describe adequately the measures to be taken to mitigate the adverse effects of the project.

7. The EIS fails to reflect, and defendants failed to engage in, any meaningful cost-benefit analysis of the project and the reasonable alternatives thereto.

8. The EIS fails to discuss adequately reasonable alternatives to the project.

A.1. The adequacy of the EIS discussion as to the need for the highway.

PPM 90–1, Appendix E, paragraph 2a, sets out as a minimum the matters to be covered in an EIS with respect to a "description of the proposed highway improvement and its surroundings." Among the matters catalogued is "the need for the proposal".

PPM 90–1 is not any more explicit as to what constitutes a minimum discussion of "the need for the proposal". Plaintiffs argue that the EIS only presents a justification for an assumed need by uncritically accepting a high figure as to the number of persons to be moved across the Koolau Mountains in the peak direction during the peak hour of use (12,760 persons), a low factor of those who would use mass transit facilities (21.9%), a low per car occupancy (1.2 persons), and a low lane capacity (1200 vehicles per hour), all of which are open to serious questions, none of which have been discussed in the EIS. Plaintiffs point to CEQ Guidelines 40 C.F.R. 1500.8(a)(4) relating to the type of analysis required concerning alternative proposals as suggesting as a minimum the same kind of analysis with respect to the proposal itself. They suggest that two pages in the EIS, Volume I pp. 12–13, are inadequate to cover this subject.

Defendants argue that the figures used in determining the need for the additional lanes of traffic were not assump-

tions without foundation, but were taken from the Oahu Transportation Study. They also object to the issue as being raised for the first time in final argument.

I find that the issue is fairly before the court for decision. I find that the discussion of "the need for the proposal" meets the requirements of CEQ Guidelines, PPM 90–1, and NEPA.

Aside from the discussion at EIS Volume I pp. 12–13, there are other portions of the EIS addressed to this matter. Alternative computations are discussed in EIS Preface pp. 3–4 (Impact on Trans-Koolau Transit Utilization), pp. 7–8 (Land Use), Exhibit 5 (Interstate Route H-3 and Land Use on Windward Oahu), and in EIS Appendix B pp. 43–48 (Transportation and Traffic Flow), 59–63 (The Transportation Problem), pp. 31–33 (Land Use), and pp. 64–69 (Land Use Planning and Oahu General Plan). There are other portions of the EIS that relate to this issue, as, for example, the Oahu General Plan itself, which is contained in a pocket part of EIS Preface.

A.2. EIS reflection of FHWA compliance with the National Historic Preservation Act of 1966.

PPM 90–1, Appendix E, paragraph 3e provides that "when National Register Properties are involved", evidence that the provisions of 16 U.S.C. § 470f (Section 106 of the Historic Preservation Act of 1966), have been satisfied, "should be included" in the EIS, "when pertinent and available", "to the extent practicable".

PPM 90–1, paragraph 5d, suggests that the provisions of 16 U.S.C. § 470f "should be satisfied" before submitting the final EIS to the FHWA.

CEQ Guidelines 40 C.F.R. 1500.9(a) suggests that "to the extent possible", statements or findings concerning environmental impact required by other statutes, such as 49 U.S.C. § 1653(f) or section 106 of the National Historic Preservation Act of 1966, should be combined with the EIS prepared pursuant to NEPA, "to yield a single document which meets all applicable requirements."

DOT Order 5610.1A, paragraph 9, contemplates that the NEPA EIS shall be prepared in such a manner as to meet the statement requirements of, among other statutes, section 4(f) of the DOT Act, and section 106 of the Historic Preservation Act.

Regulations promulgated by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, require early identification and protection of properties that are included in or eligible for inclusion in the National Register of Historic Places and a draft environmental statement prepared in compliance with NEPA. *See* especially 36 C.F.R. 800.4(a) and 800.6(e)(2).

Plaintiffs argue that the EIS is woefully deficient in respect to this type of information in relation to several sites and objects entitled to protection. These are:

(a) Pohaku ka Luahine—which was placed on the National Register of Historic Places on July 26, 1973.

(b) Moanalua Valley—which was determined to be likely to be eligible for listing on the National Register of Historic Places on March 29, 1974, the determination having been published on May 8, 1974 (39 Fed.Reg. 16176).

(c) Properties possessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact.

One of the difficulties in applying new law to old projects is that steps that would now be taken early in the process

must be superimposed on a process that has gone on for several years. The H-3 project dates from about 1964–1965. The first 6 volumes of what was then called a final EIS were submitted to the FHWA by the State on August 2, 1972. These volumes were followed by a Preface and two Appendices, the former submitted March 15, 1973, and the latter submitted December 26, 1973. EIS Volume I pp. 24–34 and 63–68 discuss petroglyph rocks (of which Pohaku ka Luahine is one), other archeological sites in Moanalua Valley, Bishop Museum archeological studies which appear as EIS Volume IV Appendix 4(e), and agreements contemplated between the State and the owners of Moanalua Valley to minimize the impact of the highway on the archeological sites and valley itself.

The EIS Preface pp. 2, 8–9, and Exhibit 6, set out at some length discussions and proposed agreements between the State and the Damon Estate regarding Pohaku ka Luahine and Moanalua Valley. EIS Appendix A, pp. 183–368 contains extensive material regarding the historic importance of Moanalua Valley. EIS Appendix B, pp. 34–42, 97–102, and Attachment III, discuss Moanalua Valley and Pohaku ka Luahine.

I find that the discussions in the EIS of the impact of the highway on properties possessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact, especially with respect to the petroglyph rock Pohaku ka Luahine and to Moanalua Valley, were adequate when submitted both for purposes of NEPA and for purposes of a 4(f) statement. The fact that the 4(f) requirements may not have been satisfied before the final EIS was submitted to the FHWA on December 26, 1973, or that additional

information may now be required for an adequate 4(f) statement, does not require that the entire EIS be recalled, revoked, and resubmitted. The major considerations and disputes surrounding the preservation of historical sites that might be affected by this project were clearly expounded and brought to the attention of the responsible state and federal decision-making officials.

Furthermore, the responsible government officials had good reason to believe in December 1973 that agreements had been reached regarding the protection of Pohaku ka Luahine and the minimization of adverse effects on Moanalua Valley.

Plaintiffs suggest that there are numerous other historic sites, particularly on Windward Oahu, that should have been discussed in the EIS. No one came forward with a serious contention that any other such site would be affected by the highway.

A.3. The adequacy of the EIS discussion of the impact of the project on historical resources.

A reading of sections 102(2)(C)(i) and (ii) of NEPA, PPM 90–1 Appendix E, CEQ Guidelines 40 C.F.R. 1500, et seq., and DOT Order 5610.1A, does lead to the conclusion that an EIS which is developed from scratch as of today should describe the significant impacts of the project on historic sites, landmarks, cultural or scenic resources of national, state or local significance, and any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge.

Plaintiffs reargue in this regard the insufficiency of the EIS (i) in failing to identify Moanalua Valley as a site protected by 16 U.S.C. § 470f, (ii) in failing to identify the adverse effects of the project on Pohaku ka Luahine, (iii)

in failing to identify various historically significant sites in Halawa Valley and Moanalua Valley, (iv) in failing to discuss the effect of the project on historical resources located on Windward Oahu, and (v) in failing to include any discussion of the proposed taking of 4.09 acres of the Pali Golf Course.

For the reasons set out above under A.2, I find that the discussion in the EIS is adequate compliance with the referenced statutes, regulations, orders, policy memoranda, and guidelines.

While it is true that the taking of the Pali Golf Course property is not discussed in what has been identified as the EIS, a separate Report on the Pali Golf Course was submitted to FHWA by the state on October 5, 1971. It would seem that in this instance the state was following good practice in attempting to satisfy 4(f) requirements before submitting the final EIS.

In any event, plaintiffs do not contend that the responsible state and federal decision-makers were not aware of the Report on the Pali Golf Course, or that the report was not circulated and reviewed by the proper officials. They do contend that the report should have been incorporated in, and circulated at the same time as, the submission labeled "Final Environmental Statement". This is exalting form over substance.

An examination of the actual area taken shows that the land in question is not part of the golf course playing area. This may account for the fact that no witness has complained about this taking, and that plaintiffs did not attack the adequacy of the report as a 4(f) statement.

A.4. Adoption of findings of various federal agencies having expertise in certain areas.

Section 102(2)(C) of NEPA requires that the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a contemplated major federal action significantly affecting the quality of the human environment. Statements, comments and views of such officials are required to be circulated with the proposal for action through the existing agency review process. The views of such agencies must be given careful consideration and cannot be ignored or overridden without what amounts to a showing of good cause.

Plaintiffs contend that defendants failed to defer to a CEQ statement that the EIS was inadequate in certain respects, and failed to defer to EPA criticisms of the air pollution studies, the assertion that the highway will not affect development rates on Windward Oahu, and the assessment of the impact on Kaneohe Bay.

Much was made of the competing and allegedly contradictory air pollution studies by different experts. Without reviewing all of this evidence, the fact is that defendants did not ignore EPA's criticisms but spent considerable time and money checking and rechecking their results. The final result cannot be said to be that EPA has been overridden in any event, as the EPA letter only called for more information which was supplied. I am not aware that EPA thereafter disapproved the EIS's discussion of air quality.

Similarly, with respect to the other comments by CEQ and EPA, defendants responded with specific replies. As these bodies raised questions rather than stated facts, there is no direct contravention of their expertise.

A.5. The adequacy of the EIS discussion as to the secondary effects of the project.

NEPA, CEQ Guidelines 40 C.F.R. 1500.8(a)(3)(ii) and PPM 90–1, Appendix E, paragraph 2.b.(1), require a discussion in the EIS of the secondary or indirect consequences for the environment of the project. Examples of matters to look for are given, such as associated investments, changed patterns of social and economic activities, and changes in population patterns or growth, and their effects upon the resource base, land use, water, and public services.

Plaintiffs fault defendants in this regard for not conducting an adequate research program of all possible potential secondary impacts suggested by existing knowledge, not considering the secondary impacts outside of "Census Track 103", and inadequately discussing the secondary impacts within "Census Track 103".

An in-depth socio-economic study was conducted by the state on the Heeia-Kahaluu Kualoa area. This study is included in EIS Appendix B as Attachment IV. Socio-economic effects in general are discussed in EIS Volume I pp. 55–58. Population growth and distribution is discussed in EIS Preface Exhibit 5 pp. 1–12. Further socio-economic considerations are discussed in EIS Appendix A and Appendix B. Reviewing this discussion, I find that it is an adequate statement of the secondary or indirect consequences of the project as required by applicable statutes, regulations, and guidelines.

A.6. The adequacy of the EIS description of mitigating measures to be taken.

NEPA implies a requirement that action be taken to mitigate the adverse effects of major federal actions.

Plaintiffs argue that the EIS is deficient in this area because it does not adequately discuss the adverse effects of the highway (especially the socio-economic effects), and to the extent that it does discuss such effects, the individuals affected were not consulted and the federal, state, and local agencies best equipped to suggest ways to minimize harm were never asked to do so.

Assuming there is more to this requirement than the procedural steps detailed in NEPA and supporting directives, the short answer is that plaintiffs' contention is simply not correct. The review process itself is a request to concerned agencies for comments and suggestions. Extensive public hearings were held at which those affected could be heard. Written comments from anyone were solicited. Specific steps to be taken to mitigate specific adverse effects are discussed in the EIS, as for example with respect to noise at EIS Preface pp. 4–7.

There is no such failure of the EIS to discuss mitigation of adverse effects as to render the EIS inadequate.

A.7. Cost-benefit analysis of the project and of the reasonable alternatives thereto.

NEPA and supporting directives require that methods and procedures be developed which will insure that unquantified environmental amenities and values may be given appropriate consideration in decision making. Case law explains this requirement in terms of a balancing judgment to be made by the responsible decision-making officials whereby the particular economic and technical benefits of planned action are assessed and weighed against the environmental costs in order to ensure that the optionally beneficial (minimally adverse) action is finally taken. This evaluation is discussed today in terms of cost-benefit analy-

sis. Combined with the requirement that alternatives to the proposed action (including no action) must be set out in detail in an EIS, the developed state of the art would suggest a cost-benefit analysis for each alternative which would imply a study of each alternative to the same depth as the main proposal.

Plaintiffs assert that the EIS is inadequate because it does not contain any such cost-benefit analysis.

Plaintiffs' expert testified that the EIS here was deficient in cost-benefit analysis. He made a very convincing presentation as to how this should be done. He then stated that he had not yet read an adequate cost-benefit analysis in an EIS for a transportation project, and that the EIS here was no worse in this respect than the others. He added that the EIS here was about what one would expect given the state of the art at the time it was written.

As federal agencies become more sophisticated in the identification and quantification of environmental impacts, the balancing of costs and benefits, and the comparison of alternatives, they will no doubt develop some standard methodologies that will turn up in new guidelines or policy and procedural memoranda. So far, no particular method of cost-benefit analysis has been decreed for use in an EIS.

The EIS for (T)H–3 does contain a discussion of the costs and of the benefits of the proposed highway and of certain alternatives. Primitive as it may be, it is no worse than other early attempts in this area. It was not condemned by CEQ or EPA. There is no doubt that the advantages and disadvantages of the project were aired at length and in depth at the section 128 hearings, as reflected in EIS Appendices A and B.

An underlying consideration is that this project assumes the Oahu General Plan. Considerations of costs and bene-

fits went into the development of the Oahu General Plan. It is an authoritative statement of policy. Plaintiffs would have the EIS reflect a reconsideration of the decisions reached in the Oahu General Plan. In fact the Oahu General Plan is now in the process of revision. The same city and state authorities whose concurrence is necessary to the future of (T)H–3 are involved in this process of revision. The inclusion of the Oahu General Plan in the EIS means a great deal more to them, and to the responsible federal officials, in terms of what it says as to relative costs and benefits of proposed actions than would pages of words or mathematical models.

Some individuals respond to prose, some to mathematics, some to charts. The EIS has some of each method of communication. Taken as a whole, it adequately deals with the costs and benefits of the proposed action and of the alternatives examined.

A.8. The adequacy of the EIS discussion of alternatives.

An EIS must discuss alternatives to the proposed action. Not all possible alternatives need be discussed, but only those alternatives that are reasonably feasible. The alternative of abandoning the proposal must be discussed.

Plaintiffs argue that no meaningful study of alternatives has been made because there had been a commitment in 1965 to construct H–3, and that there is a reasonable and feasible alternative proposed by the City and County of Honolulu which is not discussed in the EIS.

Here again, we are faced with the problem of applying new law to old projects. It is true that a decision was made in 1965 to construct H–3. The decision was reached in accordance with all applicable federal, state, and local statutes, ordinances, regulations, memoranda, directives, and

policies, then in effect. The subsequent passage of the several environmental laws has required rethinking and restudying, but could not undo all of the earlier actions.

The consideration of alternatives was not invented by NEPA. Under the earlier procedures and as a result of corridor hearings, the responsible officials changed the original proposal which was to increase the capacity of Likelike Highway, and settled on the route through Moanalua Valley instead, because of the unacceptable socio-economic effects of the original proposal on the residents of Kalihi Valley. It is ironic that the city's alternative proposal would shift back to Kalihi Valley.

The fact is that an alternative not unlike the city's proposal is discussed at length in the EIS. It is also a fact that in the EIS review processes, H–3 was modified to (T)H–3, one of the reasonably feasible alternatives to the original H–3 project.

There is no evidence that there is any other reasonably feasible alternative that should be discussed in the EIS.

Plaintiffs argue that defendants did not put the requisite time and effort into developing alternatives in depth. Assuming this is a requirement of NEPA, the record is to the contrary. Extensive studies of alternative corridors were made in 1964–1965. An alternative to the original corridor was in fact selected. Many of the studies relating to H–3 or (T)H–3 apply equally to the Likelike Highway alternatives.

I find that the EIS contains an adequate discussion of alternatives to the proposed action.

B. Section 128 Hearings

Following the court's order of July 13, 1973, entering partial summary judgment in favor of plaintiffs, new public hearings were held on August 27, 28, 29, 30, and 31, and on

September 4, 1973. EIS Appendix B summarizes and discusses the testimony and material received at these hearings.

Plaintiffs are satisfied that defendants have now complied with the provisions of 23 U.S.C. § 128, PPM 20–8, PPM 90–1, and 23 C.F.R. 790, as they relate to public hearings. Accordingly, plaintiffs have withdrawn any further prayer for relief pursuant to the second cause of action in 72–3606.

C. The CCC Process

Section 105 of the Federal-Aid Highway Act commands in paragraph (d) that in approving programs for projects on the federal-aid urban system, the secretary of transportation "shall require that such projects be selected by the appropriate local officials with the concurrence of the State highway department of each State and, in urbanized areas, also in accordance with the planning process required pursuant to section 134".

Plaintiffs have proceeded on the assumption that (T)H–3 is a project on the federal-aid urban system. This system is defined in section 101 as "the Federal-aid highway system described in subsection (d)" of the section. Subsection (d) refers again to the planning process under section 134.

Actually (T)H–3 is part of the National System of Interstate and Defense Highways described in subsection (e) of section 103. Approval of projects on this system are not specifically required to be selected by local officials or in accordance with the planning process under section 134.

There is also some confusion as to whether (T)H–3 can be considered to be a project in an "urban area" or "urbanized area" as those terms are used in the highway act. It

would appear that the federal-aid urban system contemplates routes entirely within urban areas.

On the other hand, an early instructional memorandum required the concurrence of the City and County of Honolulu, and the situation in Hawaii is such that the designation of H–1, H–2, and H–3 as part of the Interstate System would appear to have been more for the purpose of eligibility for federal funds allocated to this system than for the purpose of overriding local concerns.

Assuming that the planning process of section 134 applies to the approval of (T)H–3, plaintiffs argue that the requirements of this section have not been met and that such failure must result in an injunction prohibiting further expenditure of federal funds on H–3. To understand this argument, some exposition of the section 134 planning process is necessary.

Section 134 mandates that the secretary of transportation "shall not approve under section 105 . . . any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section." This is known as the 3C process—continuing, comprehensive, cooperative.

The 3C process is spelled out in PPM 50–9. There must be a formal procedure supported by a written memorandum of understanding between the state highway department and the governing body of the local community "for carrying out the transportation planning process in a manner that will insure that the planning decisions are reflective of and responsive to both the programs of the State highway department and the needs and desires of the local communities."

There is such a formal procedure for Oahu. It is known as the OTPP (Oahu Transportation Planning Program). It establishes a policy committee of 4 members—2 from the state and 2 from the city. The memorandum of understanding provides that decisions of the committee shall be reached only upon unanimous agreement.

The planning process includes and requires the development and continuous evaluation of short-range and long-range highway and transportation plans. These plans are to be updated annually. The entire 3C process is to be certified annually by the regional FHW Administrator. Without this certification, the requirements of section 134 have not been met and project approval will not be granted.

Short-range and long-range highway and transportation plans for Oahu were developed beginning with the year 1972. H–3 was duly reflected on both sets of plans by unanimous agreement of the OTPP policy committee. FHWA certification was duly obtained. The same process was repeated in 1973. Then in 1974 the OTPP policy committee voted 2–2 on H–3 as part of the 1974–1979 short-range plan. All other projects were included or excluded by unanimous vote, but the status of H–3 remained in doubt.

FHWA officials took note of this disagreement and granted conditional certification of the 3C process for 1974–1975. Certain deficiencies in the process were noted, among them the stalemate caused by the unanimous agreement provision of the OTPP. Presumably, if these deficiencies are not corrected, certification will be withdrawn, and all federal-aid highway assistance not already committed will cease.

It is this situation which plaintiffs argue constitutes noncompliance with section 134.

What took place at the policy committee meeting on June 24, 1974 at which H–3 received a vote of 2–2 is disputed.

The city's position is that the motion before the body was to include H–3 in the 1974–1979 short-range plan. The state's position is that the motion before the body was to delete H–3 from the 1974–1979 short-range plan. In either case, the motion failed to carry.

I find from the evidence that the state's position is correct. H–3 is still part of the long-range plan and has not yet been deleted from the short-range plan. Administrative effectiveness requires continuity of decisions reached unless changed by affirmative action.

Furthermore, the regional FHW Administrator's conditional certification was a reasonable action within his authority under the circumstances. To what extent the city-state dispute may affect FHWA support of (T)H–3 is a matter within the administrative discretion of FHWA officials. So far, the procedural requirements of section 134 have been met.

While plaintiffs withdrew their second alternative claim to the third cause of action, the foregoing discussion relates to both alternative claims.

Defendants suggest that the OTPP memorandum of agreement is invalidated by the Hawaii State Constitution Article III Section 17. I find no merit in that argument.

D. The City Charter

H.R.S. § 264–36 requires all federal-aid highway projects to conform to the master plans of the respective political subdivisions of the state.

On Oahu, the master plan adopted in 1964 pursuant to the provisions of the 1959 charter of the City and County of Honolulu is known as the Oahu General Plan. As originally adopted the OGP did not reflect the alignment of H–1, H–2, or H–3. These were added to the OGP by council action on May 21, 1974. At this time, the city charter

had been amended. Assuming the requirements for placing the interstate highway system on the OGP would be the same under either the 1959 or the 1973 charter, I find that the process was validly carried out.

The plaintiffs argue that the council failed to take into consideration the matters required by the charter provisions, and failed to meet the requirements imposed by the Hawaii Supreme Court in Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199.

Assuming that I have the jurisdiction to go behind the council's action, I find that the requirements of the city charter(s) and of the *Dalton* case were met and that H–3 is validly part of the OGP.

The council committee's report on the ordinance (to indicate the H–3 highway) reflects extensive study and many hours of public hearings. There are extensive findings of fact. Clearly the council carefully considered the general welfare and prosperity of the residents of the city and the physical, social, economic and governmental conditions and trends involved.

There was evidence that no new socio-economic studies were made in connection with this ordinance. In this connection it is noted that the original OGP contemplated the development of the defense highway systems from Pearl Harbor to Diamond Head and from Pearl Harbor to Kaneohe Naval Station on the Windward side.

E. Preservation of Parklands

23 U.S.C. § 138 and 49 U.S.C. § 1653(f) prohibit the secretary of transportation from approving any program or project which requires the use of any publicly owned land from a public park or similar area, or any land from an historic site of national, state, or local significance, unless

(1) there is no feasible and prudent alternative to such use, and (2) the program includes all possible planning to minimize harm to the area resulting from such use.

Plaintiffs assert that the provisions of these statutes, for ease of reference called the 4(f) requirements, have not been met with respect to (1) the Pali Golf Course, (2) the petroglyph rock Pohaku ka Luahine, and (3) Moanalua Valley.

E.1. The Pali Golf Course

It is admitted that the Pali Golf Course is a publicly owned recreation area to which section 138 applies inasmuch as some 4 acres from the park will be taken to accommodate an off-ramp.

A 4(f) statement on this use was prepared. On December 3, 1974, the secretary of transportation made the required 4(f) finding. In doing so he had before him not only the separate statement on the Pali Golf Course but also the other volumes constituting the EIS.

Plaintiffs argue that the secretary's determination is wholly inadequate. Measured by the standards developed in cases arising under this statute, the secretary's determination of no feasible and prudent alternative and of all possible planning to minimize harm is supported by the record.

The actual taking is of minor proportions. An earlier plan that would have infringed upon the playing area was modified. The use of the golf course is not affected in any manner. If anything, the course is made more accessible to the public. No dislocation of facilities or persons is involved. The 4(f) statement adequately discusses why suggested alternatives are not feasible and prudent.

E.2. Pohaku ka Luahine

This petroglyph rock was placed on the National Register of Historic Places on July 26, 1973. It is therefore entitled to the protections afforded by the National Historic Preservation Act.

Defendants argue that the rock is not, however, subject to 4(f) requirements because it is an object and not a site.

It is true that the rock was nominated to and placed on the National Register as an object having local significance. Nevertheless, if the rock were still in its original location, I would have no difficulty in interpreting the listing as referring to a site. The evidence is clear, however, that the rock was bulldozed out of its original location and dumped into the stream area along with other rocks and debris several years ago. It was recovered and replaced in its approximate original location. It could just as well be moved again. Being privately owned, it could be removed from the Moanalua Valley entirely. Under the circumstances, I find that 4(f) procedures are not applicable to Pohaku ka Luahine.

It may be noted that the defendants and the owners of the rock had reached a tentative agreement for a satisfactory mitigation of adverse effect on the rock. A memorandum of agreement was prepared but remains unexecuted. If 4(f) procedures do apply, such an agreement would satisfy the provisions of 36 C.F.R. 800.5. No doubt this litigation has delayed further action with respect to such an agreement.

E.3. Moanalua Valley

The issue as to whether 4(f) applies to Moanalua Valley turns upon whether the valley is an historic site of local significance as determined by federal, state, or local officials having jurisdiction thereof.

The valley is privately owned. The project requires the use of land from the valley. Is it "an historic site"?

The section leaves the determination of what is an historic site on private land to "federal, state, or local officials having jurisdiction thereof".

On May 8, 1974, the secretary of interior published his determination that Moanalua Valley "may be eligible" for inclusion on the National Register as a historic place of local significance. On August 5, 1974, the Hawaii Historic Places Review Board determined the valley to be of marginal local significance. The secretary of transportation thereafter determined that 4(f) does not apply to Moanalua Valley.

Executive Order 11593 and 36 C.F.R. Part 800 make it clear that protection should be afforded to possibly affected possible historic sites at the earliest stages of a project. Hence, the determination by the secretary of interior that a property is eligible for inclusion in the National Register triggers all protections given to a property actually included until the eligibility is resolved. To determine that a property "may be eligible" introduces another level of uncertainty. 36 C.F.R. 800.3(f) refers to a determination that a property is "likely to meet the National Register Criteria."

The secretary of interior has determined that Moanalua Valley is not a property of national historic significance. Who then resolves the question of whether it is of local historic significance? Local officials having jurisdiction over these matters have determined that Moanalua Valley is at best of only marginal historic value.

Moanalua Valley has received the protections afforded an historic site while this controversy has been going on. Construction of the highway has been enjoined (albeit for other reasons), and the designation of the valley as an

historic site has been considered and reconsidered by federal and state officials. The final upshot of all this activity is that Moanalua Valley has not been placed on the National Register nor designated for preservation under state statutes.

I conclude that 4(f) does not apply to Moanalua Valley.

F. Air Quality

Upon conclusion of the trial on the merits, plaintiffs withdrew this cause of action, relating to the requirements of 23 U.S.C. § 109(a) and (j).

G. The National Historic Preservation Act

The National Historic Preservation Act and supporting orders, regulations, instructions, and policies, require the identification and protection of properties of national, state, or local historic significance, and the inclusion of information relating thereto in the EIS.

It is conceded that the NHPA procedures were eventually completed with respect to Pohaku ka Luahine and Moanalua Valley on September 19, 1974. This was two months after the EIS was approved. Plaintiffs argue that this is a violation of PPM 90-1 and CEQ Guidelines which require inclusion of NHPA information in the EIS.

On the other hand, PPM 90–1 refers to material which is pertinent and available, and CEQ Guidelines qualify this suggestion with the phrase "to the extent possible".

Notwithstanding the contention of defendants that Moanalua Valley is not an historic site, NHPA procedures with respect to the valley were completed.

Nothing in law or reason requires the EIS to be resubmitted to reflect subsequent NHPA compliance.

Plaintiffs raise here again the failure of defendants to identify any other historic properties. In the 10 years that

this project has been under consideration, none outside Moanalua Valley that are adversely affected by the project have been seriously brought to the attention of the responsible officials.

H. Project Approval on the Urban System

Instructional Memorandum 50–3–71 instructs the division engineer of FHWA in approving any programs for federal-aid highway projects in an urbanized area to find that certain conditions exist.

Plaintiffs read this memorandum as requiring a finding that the project has local concurrence and approval. They argue that the city has withdrawn its support of H-3 and therefore the division engineer cannot make the necessary finding.

It is possible to read the memorandum in the sense contended for by plaintiffs. On the other hand, prior actions by the city in supporting H-3 cloud the issue. It would appear that H-3 was selected by local officials and the state highway department in cooperation with each other and that division engineer approvals were given at a time when H-3 was part of a program serving to implement an area-wide plan developed within the planning process and held currently valid by the policy board. H-3 was placed on the Oahu General Plan by ordinance of the city council. It is still there. The suspended design contracts were secured at a time when local officials did concur. Construction of the Moanalua-Haiku Segment is a long way off. There is no reason to anticipate violations that have not occurred or to enjoin action that is not clearly illegal.

I do not decide that plaintiffs have no standing to raise this issue, but I do suggest that the proper party to litigate the matter would be the City and County of Honolulu, and that by its failure to object to approvals by the division

engineer, it is in effect concurring therein. I am also aware that there may well come a time when FHWA officials will find that the 3C process has broken down on Oahu, at which time they may have to suspend federal-aid to highways until the process is reestablished.

GENERAL CLAIMS

I have attempted to deal with each claim and argument made by any plaintiff. There was a general claim by plaintiffs that the entire process engaged in by state and federal officials was merely an exercise in justifying what had already been predetermined. As a general proposition, this is probably a valid observation concerning any human endeavor. People hear what they want to hear, see what they want to see. Yet it cannot be said that the pros and cons of H-3 and (T)H-3 have not been widely discussed in great detail.

The ultimate decision to go or not to go remains with the responsible federal, state, and local officials. The court does not decide whether (T)H-3 is a desirable project. Neither does the court decide whether compliance with applicable statutes, regulations, orders, directives, memoranda, charters, and policies could have been better. What the court does decide is whether compliance has been so deficient as to amount to non-compliance as a matter of law. Some of these determinations are simple; others require a balancing of numerous factors.

Three times in this litigation the court has decided that the responsible officials had not complied with the law. The deficiencies noted in those prior decisions have been corrected.

CONCLUSION

Defendants have complied with all applicable requirements of law set out in the complaints in Civil Nos. 72–3606 and 73–3794.

The injunction heretofore entered by stipulation and order on September 15, 1972, and the injunction entered by order on October 18, 1972, should be dissolved.

The foregoing shall constitute the court's Findings of Fact and Conclusions of Law required by Fed.R.Civ.P. 52(a).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

STOP H-3 ASSOCIATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 1976

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QUESTIONS PRESENTED

Pursuant to 23 U.S.C. §138; 49 U.S.C. §1653(f):

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreational lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and

waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

1. Whether the U.S. Secretary of Interior acting pursuant to the authority vested in him under the National Historic Preservation Act, 16 U.S.C. §470a(a)(1), and Executive Order 11593, has "jurisdiction" within the meaning of §4(f) to make determinations of the local historic significance of privately-owned historic sites.

2. Whether the U.S. Secretary of Interior followed proper procedures under the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, in designating Moanalua Valley "eligible" for inclusion in the National Register of Historic Places as a site of state or local significance.

3. Whether the determination by the U.S. Secretary of Interior that a property is "eligible" for inclusion in the National Register of Historic Places is sufficient to trigger the protections of §4(f).

4. Whether a determination by the U.S. Secretary of Interior under authority of the National Historic Preservation Act, 16 U.S.C. §470(a)(1), and Executive Order 11593 that a property has historical significance can be reversed by the findings of a local review board.

5. Whether the petroglyph rock, Pohaku ka Luahine, a property listed on the National Register of Historic Places, is a site within the meaning of §4(f).

INTRODUCTORY STATEMENT

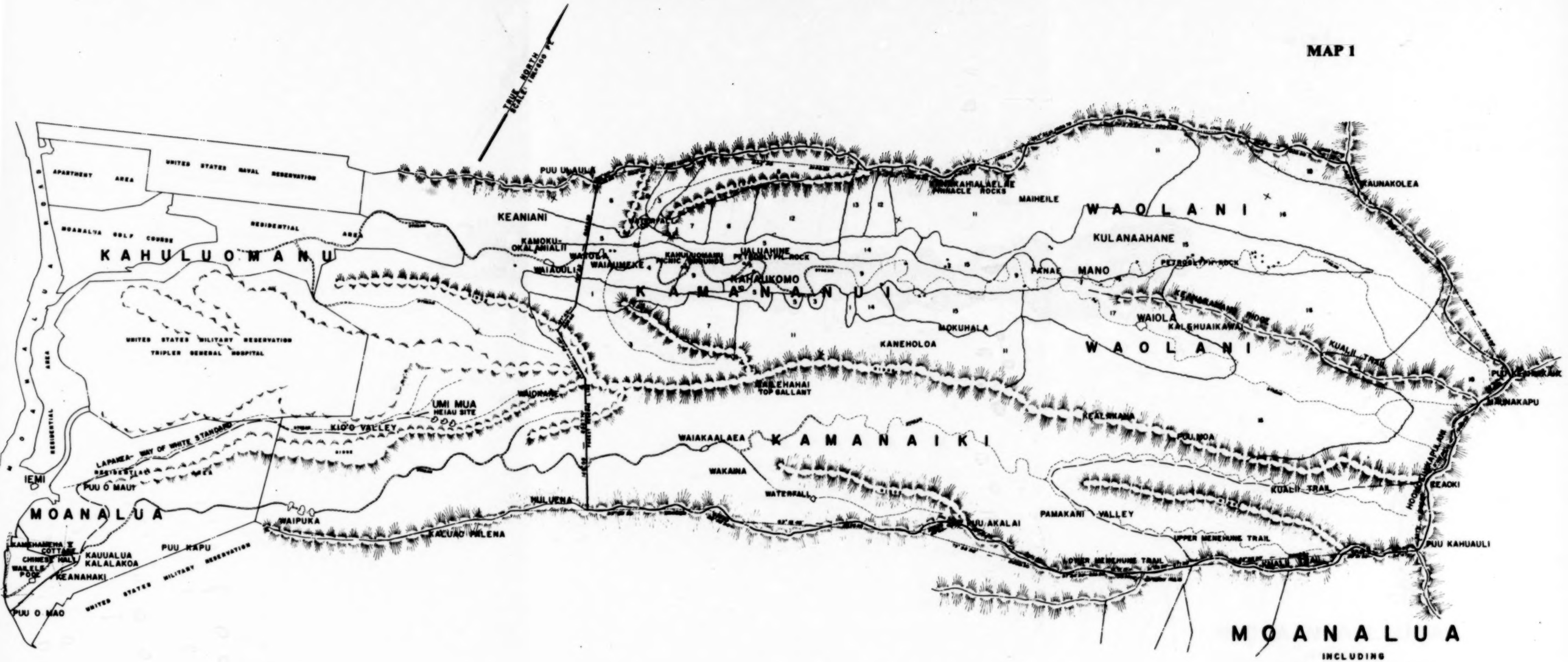
(T)H-3 represents far more than just another highway—it will create a changed Hawaiian style of life. To add to this dilemma, the highway as planned will run smack up the middle of Moanalua Valley, a site determined by the U.S. Secretary of Interior to be eligible for inclusion in the National Register of Historical Places. Even the President's Advisory Council on Historic Places considers the impact of (T)H-3 on the Valley *adverse*. Therefore, if historic preservation is to mean anything, these determinations must be honored by denial of the writ of certiorari.

MAP ONE: The Moanalua Valleys, showing historic and archeological sites and zones of native vegetation.

MAP TWO: The Moanalua Valleys, showing the amount of parkland where the grade is 25% or less and the impact of (T)H-3 thereon.

MAP THREE: The Moanalua Valleys, showing historic and archeological sites and zones of native vegetation, the parkland, and the noise zones of Great Impact and Some Impact (as defined in the E.I.S.) if the proposed (T)H-3 is constructed.

MAP 1



MOANALUA

INCLUDING

MOANALUA GARDENS

UMI MUA & IEMI

KAMANANUI & KAMANAIKI VALLEYS

& WAOLANI VALLEY

PREPARED BY:

MOANALUA GARDENS FOUNDATION

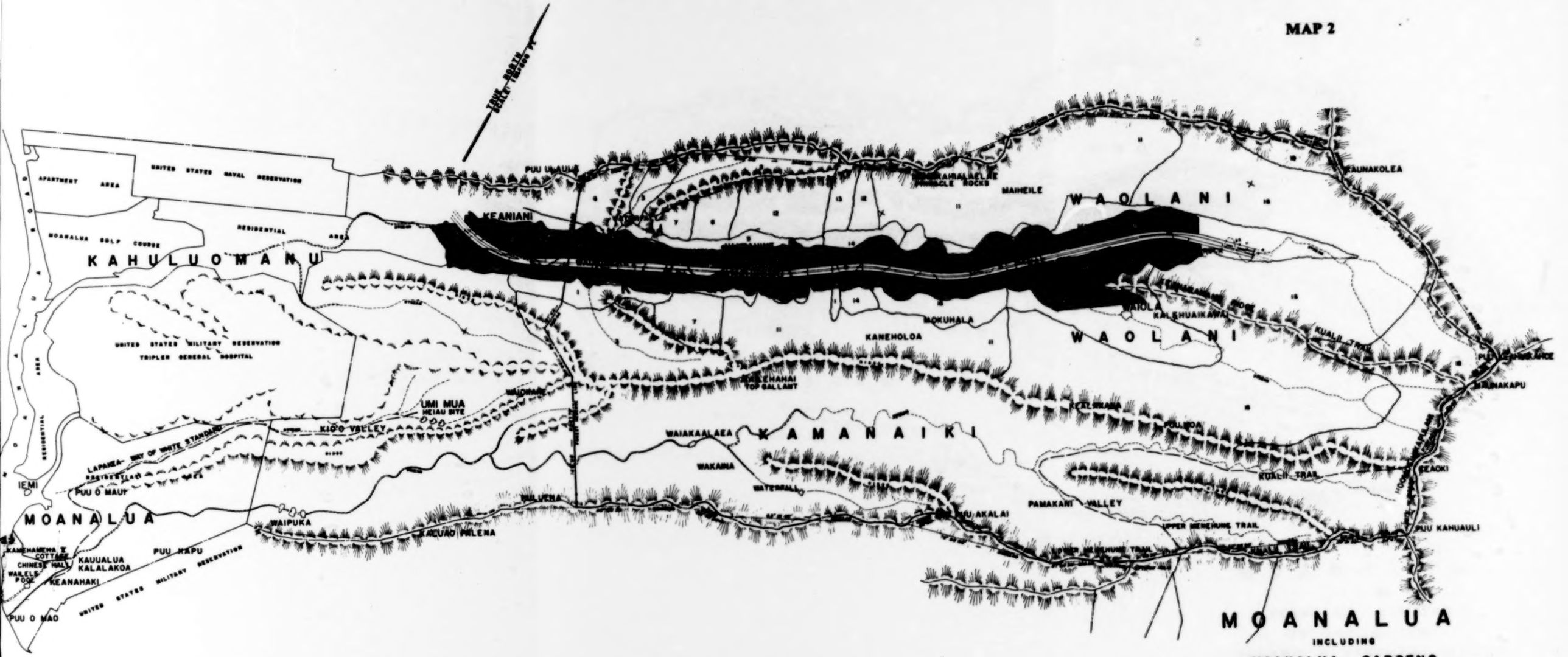
1502 Pineapple Place

Honolulu, Hawaii 96819

March, 1973 Updated July, 1975

Walter P. Thompson, Inc. Engineers - Surveyors

MAP 2



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1352 Pineapple Place
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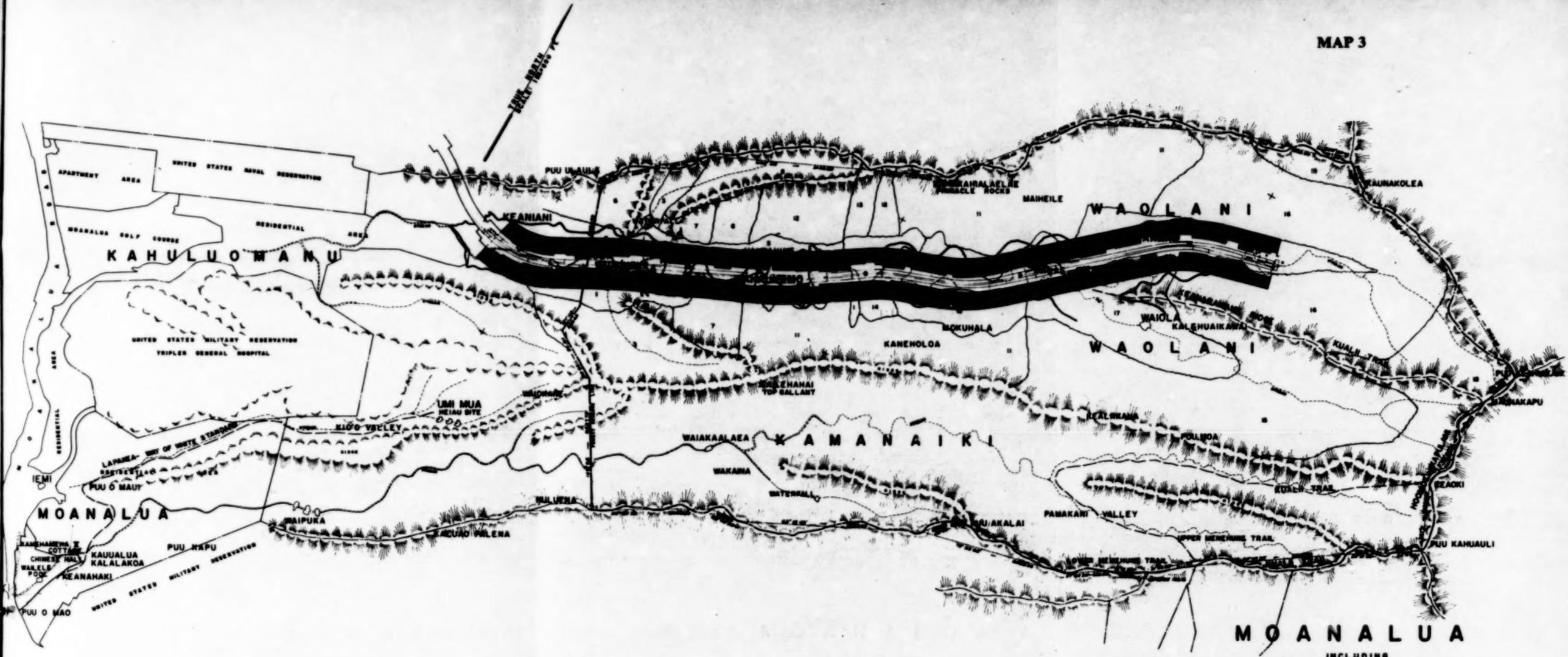
Walter P. Thompson, Inc. Engineers - Surveyors

MAP 3



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1502 Pineapple Place

Honolulu, Hawaii 96822

March, 1973 Updated July, 1975

Walter P Thompson, Inc. Engineers-Surveyors

STATEMENT OF THE CASE

A. Factual Background

1. *Need for (T)H-3:* The State justifies the building of (T)H-3 on an assumed need to transport 12,760 persons (peak hour, peak direction) from the eastern side of Oahu (referred to hereafter as Windward Oahu) across the Koolau Mountain range and into downtown Honolulu in the year 1990.[1] However, when evaluating the manner in which these 12,760 people are to be handled, it becomes apparent that the State is merely trying to "softsell" a highway rather than honestly examine the need for it.[2]

It's important to understand that the planned direction for Oahu's population growth is not the area to be served by (T)H-3 but rather the leeward plain which is in exactly the opposite direction (Western side of Island.). Because of the tremendous influence highways have on determining population growth, the construction of (T)H-3 will severely upset the City and County's planned area of development.

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[1] Reference was also made in Petitioner's Brief that the building of (T)H-3 was consistent with the 1964 Oahu General Plan (OGP), considered the format for development for City and County of Honolulu. *(Pet. 8 n. 3)* This statement is false and should not have been overlooked by Petitioner as it was a Cause of Action in Plaintiffs' original Complaint. As brought out then, the 1964 OGP made no provision for (T)H-3, forcing the State to seek an amendment in January of 1973. It was not until June of 1974, over strong opposition by responsible local officials such as the Mayor, the Department of Transportation Services and others, that the amendment was forthcoming. In addition to the City administration's opposition to the (T)H-3 amendment, public hearings on the matter showed public sentiment to be 8-1 against the project.

The OGP has been criticized severely since its inception and is now in the process of complete revision. It is interesting to note its change in policy. Latest drafts require Oahu's transportation needs be satisfied by mass transit and not highways.

[2] Assumptions made by the State do not even reflect present day traffic on Oahu. Two of the more outrageous assumptions were a figure of 1.2 persons per car and a diversion rate of 21.9% (percentage of people that would use mass transit as opposed to the car.) This is absurd for currently the average number of persons per car is 1.5 (study conducted by Hawaii Department of Transportation, July, 1976). Similarly, in cities like Honolulu where gateway situations exist (limited access routes to downtown area because of water, mountains, etc.) transit diversion rates of up to 79.4% are common. (Union City, New Jersey: Route 495)

It must also be pointed out that although (T)H-3 is an Interstate Defense Highway it is so in name only. The reason it was designated as such was to procure the higher rate of federal funds allowed for Interstate highways. (Such highways are 90% funded by the federal government.) As for defense needs, the fact that Oahu's present transportation facilities were able to meet the needs of the Vietnam era illustrates that no new facilities are required. There certainly can be no greater test of a system's capacity than during those years.

2. *Description of the Undertaking:* (T)H-3, if constructed, would add an additional six lanes to the already existing eight lanes of traffic now traversing the Koolau Mountain range. The highway originates at the Halawa Interchange, extending through Moanalua Valley and up to the proposed Halekou Interchange on the Windward side. It then proceeds to Kaneohe Marine Corps Air Station. The undertaking would require the boring of two tunnels, one of 0.4 miles running through Red Hill into Moanalua Valley, and the second, of 0.9 miles, through the Koolau Mountains from Moanalua Valley to the Windward side of the island.

More specifically, the highway would utilize the north branch of the narrow Moanalua Valley to enter the Koolau Mountain Range. (T)H-3 would have two three-lane roadways separated by a median, with each roadway 36 feet wide with a paved shoulder 10 feet wide on the right and a paved shoulder 4 feet wide on the left. The median strip would be a minimum of 36 feet in width, the exact amount determined by topography. The proposal includes the use of viaducts in portions of the valley.

To route the proposed (T)H-3 through the valley would necessitate the construction of an earth and rock berm 59 feet high as a water retention structure. The berm's purpose would be to delay the peak flows in Moanalua Stream, functioning only in times of unusual storms.

Total cost of the project is approximately $300 million. Of those portions completed, all could be used with minimal expense.

The decision to use the Moanalua Valley corridor was an amendment based on the 1965 public hearings. The valley was selected for reasons familiar to this Court, i.e., no one lived in the valley who could object. *See Citizens v. Volpe*, 401 U.S. 402 (1971). However, the fact that the public favored Moanalua Valley is not in any way indicative of their acceptance of the project.[3] It only meant they did not want the highway running through their backyards. Regarding the public dislike for (T)H-3,[4] subsequent hearings and

[3] One group the Petitioner has grossly misquoted is the Outdoor Circle, a Hawaiian environmental group. The Petitioner maintains Outdoor Circle initially suggested putting the highway through Moanalua Valley *(Pet. 10)*. This statement is unequivocally false and obviously designed to influence the Court. In fact, the Outdoor Circle has strongly objected to (T)H-3. In a letter sent Admiral Wright, State Department of Transportation, Outdoor Circle clearly established their position on (T)H-3:

> The Outdoor Circle is deeply concerned that previous statements of the organization have been taken out of context and historical perspective. Our position formulated over the years is not truly reflected in the Environmental Impact Statement for H-3 nor in statements made during these hearings by State officials.
>
> As stated by the Circle in July 1971, we do not feel that it is in the best interests of our country to force the people of this State to build highways and ruin our natural beauty with soon to be outmoded freeways. Hawaii's unique status needs to be considered. What we need is a superior public transportation system now. *Letter dated August 29, 1973 from Outdoor Circle to Admiral Wright.*

[4] This opposition includes the City administration who feels the only sensible way to meet 1990 needs is mass transit:

> In 1970, Oahu's auto population numbered 285,000, and, based on present trends, this will increase to exceed 500,000 within the next 20 years. However, the trend the past three years has far outstripped those projections with five per cent per year increase. On that basis, there would be a 250 per cent increase over the 20 year period or 710,000 vehicles. There are only 1,200 miles of roads and streets on Oahu at the present time, and this will remain relatively constant for the foreseeable future based on present State and City planning; if the street system in Honolulu is congested now, what will it be like with double the present number of automobiles?
>
> Add all of these together, and we come to the inevitable conclusion that the residents of Oahu cannot continue to rely on the automobile as the primary mode of transportation. We must reverse the trend by increasing the reliance of people on public mass transportation. We must have more efficient use of our present highways by using car pools, exclusive bus lanes, low-capital improvement facilities instead of building TH-3 that would encourage lower vehicle passenger occupancies and greater waste of our precious energy resources. *George Villegas, Director of Transportation Services, City and County of Honolulu, letter to ACHP, August 5, 1974.*

public polls clearly demonstrated how intense this dislike really was.[5]

3. *The Moanalua Valley:* Moanalua Valleys (Kamananui and Kamanaiki) comprise about 3,000 acres of land. Because of the extreme narrowness of the Kamananui valley floor, the 3.1 miles of (T)H-3 that will pass through it will physically occupy a major portion thereof. **(See Map)**

Kamananui, the Valley of the Great Power, contains Waolani, the valley of spirits which was, legend says, "the dwelling place of the gods." The forests of the valley retain a traditional natural state associated with the legends and the history of the area.

Moanalua was the property of the royal house of Oahu, the scene of battles and other exploits which are extolled in ancient Hawaiian chants, the Kahikilaulani and the Pele o Moanalua. After King Kamehameha conquered the island of Oahu in 1795, the valley was the home of his supporters and eventually passed in 1848 to his grandson, King Kamehameha V, then to Princess Ruth Keelikolani in 1872, and, upon her death, to her cousin, Princess Bernice Pauahi Bishop, who willed it in 1884 to her friend, Samuel Mills Damon.

The valley is currently in the ownership of the Trustees of the Damon Estate.

At the present time the Trustees do not allow vehicular access to the valley without proper authorization. This is primarily for safety due to the deteriorated condition of the jeep trail. When this road is improved, vehicular access will be permitted. Pedestrian access to the valley is unrestricted.

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[5] The Petitioner's Brief has grossly distorted public feelings on (T)H-3. In fact the residents of Honolulu are so against the highway they refer to it as the "Road to Ruin." This sentiment was expressed in the Legislative House Transportation Committee where testimony ran 3:1 against (T)H-3. Similarly, during the 1975 Legislature, opponents of the highway were able to muster the second largest rally ever held at the State Capitol. It was agonizing to see such efforts be totally ignored.

Regarding future plans for the valley, the Trustees have publicly announced their intention to develop the valley into a park and thereby preserve its archeological and historical sites. Although the Trustees are officially neutral on the (T)H-3 question, the provisions of the trust under which the Trustees must operate mandate their management of its assets for the highest return. Therefore, as Trustees, they can do nothing to stop the State from condemning the land for (T)H-3.

4. *Moanalua Gardens Foundation:* The Foundation was set up as a nonprofit corporation in 1970. Its major function is to preserve and develop the historical, cultural and natural resources of Moanalua Valley, and to encourage the use of these resources for appropriate educational and recreational purposes.

B. Secretary of Interior's Determination that Moanalua Valley Is Eligible as an Historic Site of State/Local Importance.

On March 26, 1973, Moanalua Gardens Foundation submitted an application to the United States Secretary of Interior for nomination of Moanalua Valley to the National Register of Historic Places. In response to this request, the National Park Service called on Dr. Katherine Luomala, considered internationally, nationally and locally to be the leading expert on Polynesian oral history and folklore, to review the Foundation's application.[6] Dr. Luomala concluded that the documents presented in support of the Foundation's application "are of a quality and content to convince me of the *national* value in

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[6] Previously the Damon Estate contracted with the Bishop Museum to conduct an historical survey of the Valley to supplement the archeological study being conducted for the State. The results of this survey appear in EIS, Vol. IV, Appendix A, p. 51. The conclusion reached by the Museum is that "Moanalua is rich in recorded history associated with the eventful lives of Oahu's and Hawaii's people.... Its future can provide an unspoiled setting for the telling and depicting the story of a Hawaiian Land in legend and history." *Id. at 65.*

preserving Moanalua Valley for the future".[7] On the basis of this report, the Secretary's (Interior) Advisory Board found Moanalua Valley to be of national significance and recommended that it be declared eligible for designation as a National Historic Landmark. Subsequently the Board reassessed its evaluation that Moanalua Valley was of *national* significance, saying such a determination would require more time. This decision had no bearing on its belief that the area was of state and local significance. Therefore, the final recommendation to Interior was:

> The Advisory Board strongly endorses the preservation of Moanalua Valley. Historical, cultural and natural values combined with the outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest. The Board recommends that you make these views known to the Secretary of Transportation and the Governor of the State of Hawaii.

C. Proceedings Below.

In July of 1972, Plaintiffs filed suit in the United States District Court for the District of Hawaii and sought to enjoin construction of (T)H-3 because of Defendants':

1. Noncompliance with the requirements of the National Environmental Policy Act, 42 U.S.C. §4321-4347;

[7] Report to Advisory Board on National Parks, Historic Sites, Buildings and Monuments dated May 31, 1973. The Board was created under the Historic Sites Act of 1935, 16 U.S.C. §463. Dr. Luomala's position is consistent with that of Dr. Edward Gavan Daws, professor of Hawaiian History at the University of Hawaii, hired as a consultant to prepare a portion of the EIS for (T)H-3. Dr. Daws concluded that "the materials recorded in the Damon notebooks (in support of the Foundation's application for Register status) are excellent examples of *surviving* relationships made by the Hawaiians between the Gods, man and nature....[T]he point of survival is extremely important nowadays, since on Oahu 65% of the known historic sites have been lost, mainly to development....[I]n my opinion no other place in the islands offers so much potential for putting so many people in touch with the Hawaiian view of the world in a setting so close to that which the Hawaiians themselves worked out their world view."

It is interesting to note that after incorporating the above sentiment into a draft copy of the EIS, Dr. Daws was fired because of an alleged conflict of interest. His work never appeared thereafter in the final EIS. It was to become Appendix (I) to Vol. IV.

2. Failure to hold adequate public hearings, 23 U.S.C. §128;
3. Failure to respond to local disapproval of (T)H-3, 23 U.S.C. §134;
4. Nonconformity of (T)H-3 with the Oahu General Plan (State cause of action and pendent jurisdiction granted);
5. Failure to prepare a §4(f) statement, 23 U.S.C. §138, 49 U.S.C. §1653(f);
6. Violation of safety standards relating to air quality, 23 U.S.C. §109(a) and (j).

Realizing they were obviously in violation of the law, Defendants stipulated to an injunction September 15, 1972. During the next 27 months considerable activity took place, i.e., design work was enjoined on October 18, 1972; the Preface to the EIS was ordered by the District Court to be circulated May 3, 1973; additional public hearings were ordered by the District Court on July 13, 1973; the Oahu General Plan was amended, June, 1974; a 4(f) statement was prepared for the Pali Golf Course, December 3, 1974 (required because the Pali course is a park that would be used by (T)H-3); and a State determination that Moanalua Valley is of *marginal significance*, prepared August of 1974. Therefore, when Defendants came into District Court on December 3, 1974, they assumed they had touched all the bases. The District Court agreed. *(App. 64)*. However, Plaintiffs were convinced Defendants had not and filed an appeal to the Ninth Circuit Court of Appeals.

On March 8, 1976 the Ninth Circuit Court of Appeals reversed the District Court by finding Defendants had not complied with 23 U.S.C. §138. The Appellate Court recognized the applicability of §4(f) as this Court did in *Overton Park*. This Court must reaffirm that position by denying certiorari.

REASONS FOR DENYING THE WRIT

The matter before this Court is truly unique in that during the entire history of the National Register program the Secretary of

Interior has declared a site locally significant without the concurrence of local officials only once: Moanalua Valley. Therefore, for all practical purposes, a decision by this Court will affect only those for and against the building of (T)H-3. As a consequence of the uniqueness of this suit there is no conflict among the Circuits. Most importantly the relief sought by Respondents to Stop H-3 Association *et al* is very similar to a problem this Court realized under §4(f) in *Overton Park*,[8] wherein local officials expected to rule objectively on the historicity of a property are also faced with the temptations federal funding brings. The decision reached by the Ninth is consistent with dicta from the *Overton* decision.

A. The U. S. Secretary of Interior Properly Determined Moanalua Valley as "Eligible" for Inclusion in the National Register.

Under the National Historic Preservation Act, 16 U.S.C. §470, *et seq*., the Secretary of Interior is authorized to expand and maintain a National Register of Historic Places containing property determined to be significant in American history. The importance of the Register program is that it assures that federal, federally assisted and federally licensed undertakings affecting Register properties will include a §106 review between the responsible federal agency and the

[8] *See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 412, 413 (1971).*

> But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statute.
>
> Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statute indicates that protection of parkland was to be given paramount importance....

President's Advisory Council on Historic Preservation.[9] 16 U.S.C. §470(f), Executive Order 11593 implementing the Act and ACHP procedures, 36 CFR §800, *et seq*., have expanded this consultation requirement to situations wherein the Secretary has determined that a property is "eligible" for inclusion in the Register.

The §106 process for (T)H-3 began with the petroglyph rock, Pohaku ka Luahine, a property listed on the National Register. Since the highway could have an effect on this property, the Federal Highways Administration (FHWA) was required to institute the §106 review. Accordingly FHWA made such a request November 5, 1973. Pursuant to this request, authorized representatives of the Advisory Council, FHWA and the Hawaii State Preservation Officer initiated the 106 review pursuant to Council procedures. [36 CFR §800.5].

An on-site inspection of the petroglyph rock was conducted including an inspection of Moanalua Valley, within which the rock was located. This was followed by a public information meeting.

On the basis of the information developed in consultation, the Advisory Council representative determined that the construction of the (T)H-3 would adversely affect Pohaku ka Luahine, a National Register property. It was also recognized that no boundaries had been established for the National Register property and there were allegations that the cultural significance of Pohaku ka Luahine extended to Moanalua Valley itself. Further, it was alleged that Moanalua Valley possessed historical and cultural significance of its own which would qualify it for the National Register.

On the basis of the information developed in the consultation, the Council's authorized representative determined that the question of the significance of Moanalua Valley of itself, not because of its

[9] The Advisory Council was created under the National Historic Preservation Act and constitutes an independent agency of the Executive branch of the federal government. Its main function is to advise the President and Congress on matters involving historic preservation.

relationship with Pohaku ka Luahine, was of sufficient importance to require clarification. Therefore, the Advisory Council representative advised FHWA to request a determination of eligibility from the Secretary of the Interior concerning Moanalua Valley. When FHWA declined to make the request, the Advisory Council representative brought the matter to the attention of the Secretary of the Interior. [16 U.S.C. §470(k).][10] The Secretary of Interior made the factual determination that Moanalua Valley is "eligible" for inclusion in the National Register and first published notice of this May 8, 1974.[11] In making this determination, the Secretary found that:

> Moanalua Valley possesses historical and cultural values of at least local dimensions and therefore could meet the less stringent criteria of the National Register for sites of local significance.[12]

Although this procedure was somewhat irregular, the disparity of opinion between the Secretary's Advisory Board and the State

[10] The legitimacy of the ACHP seeking the Secretary's opinion is well established. The most recent instance is *Don't Tear It Down, Inc. v. GSA*, 6 ELR 20091 *(DC DC, 1975)*. The facts show GSA attempting to construct a new building in Washington, D.C., which would require destruction of structures thought to have historical significance. When the ACHP advised GSA of the possible historical significance of the soon to be destroyed structures, GSA informed the Council that it had consulted with persons far more experienced than the Council who thought the structures were without historical importance. The Council, frustrated by such indifference, took it upon itself to consult Interior and request that a determination be made as to the properties eligible for inclusion in the National Register. After finding the property was of historical significance, the Secretary listed it on the National Register. As a result GSA was forced to comply with §106.

[11] This determination was made pursuant to 16 U.S.C. §470a(a)(1) and Executive Order 11593 §1(3).

The only measurable difference between a listed and eligible property is that the latter has not been nominated to the National Register by the appropriate officials of the State in which it is located. However, such a nomination is not required under the National Historic Preservation Act. Rather, it is the administrative custom of the Department of Interior.

[12] *Letter, Secretary of Interior, Rogers Morton to Governor John Burns, May 13, 1974*. There can be no question of the Secretary's position on this matter for it has appeared on a monthly basis since that date.

made it necessary.[13] As a result of this determination, the Council's procedures required that the §106 review include both the petroglyph rock and Moanalua Valley. After further consultation, the parties reached agreement on measures to satisfactorily mitigate the adverse effects of (T)H-3 on the petroglyph rock, but they were unable to reach any agreement as to similar mitigation measures for the Valley. Therefore, at the joint request of FHWA and Advisory Council Chairman, the matter was scheduled for consideration at the next Council meeting. [36 CFR §800.6.]

The Advisory Council met on August 7-8, 1974, and, pursuant to its responsibilities under §106, Executive Order 11593 §1(3) and ACHP procedures, recommended that (T)H-3 not be constructed in or through Moanalua Valley in order that the Valley's importance as a cultural, archeological, and historical resource not be impaired.[14] This determination was totally ignored by FHWA as evidenced by a letter dated September 19, 1974, from FHWA to ACHP. FHWA's determination to proceed with the undertaking in total indifference to the opinion of recognized experts is a policy strongly objected to both by this Court[15] and other Circuits hearing this issue.[16] The Council

[13] ACHP procedures *require* that when the historical significance of a property whose eligibility for National Register status is *questionable*, an official opinion from the Secretary of Interior is required. *36 CFR §800.4(a) (2) (January 25, 1974)*.

Although ACHP procedures fail to explain when a property's eligibility is questionable, Proposed Rules by the Department of Interior are consistent with the procedures followed in (T)H-3.

> A question on whether a property meets the National Register criteria for evaluation may occur when there is a difference of opinion on eligibility either between the agency and the State Historic Preservation Officer or the agency and the State Historic Preservation Officer on the one hand and *private groups or citizens on the other*, (Emphasis added). *41 Fed. Reg. 17689 (April 27, 1976)*.

[14] In view of the Advisory Council's responsibility under the National Historic Preservation Act such a recommendation could easily be considered a de facto finding of historical significance.

[15] *Warm Springs Task Force v. Gribble*, 6 ERC 1745 (1974) wherein Justice Douglas held:

> The Council on Environmental Quality, ultimately responsible for administration of the NEPA, and most familiar with its requirements for Environmental Impact State-

expressed its strong opposition to FHWA's disregard for its recommendation but nothing changed.[17]

B. U.S. Secretary of Interior has Authority to Determine the Local/State/National Historical Significance of a Property Under NHPA.

The legislative history of the NHPA emphasizes the importance of Interior's part in the identification and preservation of sites of local, state and national significance. 16 U.S.C. §470a(a)(1) provides in part:

> The Secretary of Interior is authorized to expand and maintain a national register of...sites...significant in American history...and culture...referred to as the National Register....

The Secretary has promulgated regulations which implement 16 U.S.C. §470a(a)(1). [39 Fed. Reg. 6402 *et seq.*, February 19,

[15] Continued
ments has taken the unequivocal position that the statement in this case is deficient...That agency determination is entitled to great weight. *Id. at 1748.*

[16] *Sierra Club v. Froehlke*, 5 ERC 1033 (S.D. Tex. 1973) wherein engineers failed to respond to the comments made by the President's Council of Environmental Quality who are statutory experts on environmental impacts. The Court held:

> Congress did not intend that a federal agency consult with another agency "which has...special expertise with respect to any environmental impact involved" and then have its comments...ignored...With all due respect to the experts acquired by the Corps of Engineers to work in environmental sections their duties cannot include their substitution for the expertise of other federal agencies charged with primary duties relating to the environment. When a conflict arises between the Corps and an agency which is making an evaluation in its particular field of expertise, and when the Corps' evaluation is based upon factors of which the reviewing agency may take cognizance, then NEPA obligates the Corps [as NHPA obligates FHWA] in most instances to defer to that evaluation. Only upon the presentation of clear and convincing evidence that the reviewing agency was incorrect in its assessment should the Corps adopt another evaluation. Even so, this refusal to defer should not occur until after the reviewing agency has had an opportunity to review the Corps' claimed evidence, and possibly reverse or modify its original evaluation. *Id. at 1072.*

[17] Since the Council is to the National Historic Preservation Act (NHPA) what the Council on Environmental Quality is to the National Environmental Policy Act, *16 U.S.C. §470(i)*, its comments should have been more favorably responded to.

1974.] Under those regulations, the Secretary, through the National Park Service, determines which of the sites nominated by the states for placement in the National Register as sites of local, state and national significance warrant such placement. Once a site is placed in the Register, or it appears that it ought to be placed in the Register, the Secretary has jurisdiction over the site. His responsibilities include the effectuation of Congressional policies which mandate its preservation *(see, e.g., 16 U.S.C.* §470(c)) and the maintenance of a program under which federal funds for its protection may be granted to the state.*[see, e.g., 16 U.S.C.* §470(a), (b), and (c).*]*

The legislative history of the Historic Preservation Act emphasizes the importance of the role of the Federal government, and particularly the Secretary of Interior, in the identification and preservation of sites of local and state, as well as national, significance. In commenting on 16 U.S.C. §470(c), which provides in part that:

> ...the present governmental and nongovernmental historic preservation programs and activities are inadequate...

the House Report, H.R. Rep. 1916, 89th Cong., 2d Sess. 7 (1966) states:

> ...the national historic preservation effort should continue to be, as it has been in the past, a function of the Department of the Interior and particularly of the National Park Service.[18]

The legislative history also makes it clear that an essential element in an effective historic preservation program is the accurate identification of historic sites of national, state and local significance. The Department of the Interior (and the Secretary) is given responsi-

[18] This is consistent with Congress' desire to assign historic preservation responsibilities to Interior. Therefore from the Antiquities Act through the Archeology and Historic Preservation Act of 1974, 16 U.S.C. sec. 469a-1 *et seq.*, and including the Historic Sites Act of 1935, 16 U.S.C. sec. 461 *et seq.*; the National Historic Preservation Act of 1966, 16 U.S.C. sec. 470*et seq.*; Executive Order No. 11593, May 13, 1971, 36 Red. Reg. 8921; and the Historic, Architectural and Archeological Preservation review responsibilities of the National Environmental Policy Act, 42 U.S.C. sec. 4321 *et seq.*, as implemented by the Council on Environmental Quality Guidelines, 41 C.F.R. Part 1500, Appendix II, Interior has been in charge.

bility for this function. The Senate Report, S. Rep. 1363, 89th Cong., 2d Sess. 6 (1966) states:

> An essential first step in the preservation of significant historic properties is to identify and catalog these properties in a manner which would facilitate the taking of effective action to preserve them. §101(a)(1) [16 U.S.C. §470a(a)(1)] would permit the Department of the Interior to expand its national register program to include historic properties of national, state, regional or local significance...

Finally, the Secretary of the Interior has the authority to determine that sites are of local, state and/or national significance under Executive Order 11593, implementing the National Historic Preservation Act of 1966, 16 U.S.C. §470 *et seq.*, *[see 16 U.S.C.* §470d(b)*]*. It provides in part:

> The Secretary of the Interior shall...advise the Federal agencies in the...identification...of historic properties.

A determination made by the Secretary pursuant to his authority under the Executive Order and the Act is given great weight. Even in those cases where local and state officials dispute a finding of significance by the Secretary, his finding alone will operate to invoke the protection of the Act. *[36 C.F.R.* §800.4(a) (2), 39 Fed. Reg. 6404, 6405, February 19, 1974.*]*

It should also be pointed out that the Secretary's determination was made in response to a legitimate request from the ACHP. The fact that the local review board (Hawaii Historic Places Review Board) disagreed in no way affects this determination.[19] As explained by the ACHP:

> The members wish to point out in particular the misconception stated in the letter of September 19, concerning the significance of

[19] Respondents have always questioned the good faith of the HHPRB's determination regarding Moanalua Valley since it was made only two (2) days before ACHP consultations August 7-8, 1974. Rather, they view such determination as a transparent attempt to influence the Council.

> Moanalua Valley. The Historic Sites Act of 1935 and the National Historic Preservation Act of 1966 give responsibility for determining values of history, architecture, and culture to the Secretary of the Interior. ***Moanalua Valley has been declared eligible for the National Register of Historic Places by the Secretary of the Interior; consequently, its significance has been established by the highest authority, and it is entitled to the consideration given any historic property in accordance with the national policy expressed in the National Historic Preservation Act and Executive Order 11593 of May 13, 1975. The opinion of the State of Hawaii Historic Review Board in no way affects this determination.*** (Emphasis added.)[20]

C. The U.S. Secretary of Interior is an Appropriate Official to Determine a Property's State/Local Significance for Purposes of §4(f).

Petitioner argues that the Secretary of Interior is not an appropriate official to render §4(f) findings for sites of state/local significance (Pet. 19). This argument ignores the wording of the Act itself which allows "federal, state or local officials having jurisdiction over property to invoke §4(f)." The use of the plural word "officials" illustrates the weakness of Petitioner's argument. *(See, App. 12 n. 15)*. This interpretation also ignores the statement by Senator Cooper during a floor debate where he explains:

[20] *Letter from ACHP to FHWA dated November 25, 1974*. Subsequent correspondence of the National Park Service confirmed that this was an official determination of Moanalua Valley's "eligibility":

> ...concerning Moanalua Valley in Oahu, Hawaii, a property determined eligible for inclusion in the National Register of Historic Places by the Secretary of the Interior pursuant to Executive Order 11593. Notice of the official determination that Moanalua Valley is eligible for inclusion in the National Register first appeared in March 29, 1974, letters from Dr. A.R. Mortensen, Director, Office of Archeology and Historic Preservation, to Mr. Robert F. Crecco, the Department of Transportation Federal Representative for Executive Order 11593, and Ms. Ann Webster Smith, former Director, Office of Compliance, Advisory Council on Historic Preservation. Notice of the determination has also been published in the monthly supplements of the "Federal Register" beginning on Tuesday, May 7, 1974. *Letter from Murtagh of the National Register to Schweigert, Co-counsel Stop H-3, dated June 23, 1975.*

> ...if *any* local body or state body or federal body having jurisdiction declares that *any* of these areas are of local state or national significance then the Secretary cannot approve any program or project which would invade or encroach upon these areas....[21]

The statute obviously allows for federal officials other than Transportation to determine the state/local significance of a site. The issue then becomes whether Secretary of Interior is such an official.

The Ninth Circuit ruled that he is and supports this by the statement of Professor Oscar Gray, a leading authority and a person who actually worked with §4(f).[22]

> Historic sites present special problems. Unlike the other protected lands they need not be publicly owned. When they are not publicly owned, no presumption of a determination of significance can arise from the fact of public maintenance since normally only publicly owned property is publicly maintained. It is, on the other hand, customary for historic sites to be designated as such by someone such as a local or state landmarks commission, or by the United States Department of the Interior. Any such designation is presumably equivalent to a determination of significance for purposes of section 4(f).
>
> The determination may be made by any of the local, state or federal officials who can claim to have "jurisdiction thereof." For these purposes "jurisdiction" may refer to more than merely political authority, although governing bodies having general jurisdiction over the land in question would be able to trigger the application of the last sentence of section 4(f) by declaring their determination of the significance of land which they wish to protect. *An agency which is authorized to decide that properties have historic importance may be regarded as having "jurisdiction" over determinations of historic significance. Some properties, for instance, are listed by the Secretary of Interior in the National Register of Historic Places. It is inconceiv-*

[21] *114 Cong. Rec. 24032 (July 29, 1968).*

[22] Professor Gray was formerly the Chief of the Environmental Office in the Department of Transportation administering §4(f).

> *able that a National Register property could be regarded as ineligible for protection under section 4(f), regardless of whether it was considered "significant" by the local or state governing bodies having political jurisdiction over the property.* A similar triggering function may inhere in a local or state historic society, if it has official status to designate landmarks. It might also be found in a state parks or recreation commissioner with respect to local parks which he has the authority to classify for state purposes, although they may not be under his administrative control. (Emphasis added.)*(App. 13 n. 15)*[23]

By assuming otherwise, Petitioner is giving local officials a de facto veto power over determinations by Interior. This position seriously weakens the effectiveness of not only 4(f) but other equally important federal legislation designed to preserve our nation's historic sites.[24]

It also ignores decisions by other courts who have consistently held that a local preference cannot in any way work to defeat the underlying Congressional policy behind 4(f).[25]

[23] Respondents must also point out the tremendous inconsistency in Petitioner's argument in drawing a distinction between determinations of historicity. By acquiescing to §106 they recognize Interior's ability to determine sites of local/state importance. In view of the Secretary's degree of expertise and the strong national policy to preserve *all* historic sites, how can Petitioner legitimately question the Secretary's authority for purposes of §4(f)? The Ninth Circuit properly determined this distinction exalts form over substance. *(App. 13).*

[24] Other legislation regarding historic preservation includes:

National Historic Preservation Act, 16 U.S.C. §470b wherein the declared policy is that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.

National Environmental Policy Act, 42 U.S.C. §4331(b) wherein Congress "authorizes and directs that to the fullest extent possible...the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, e.g., to preserve important historic, cultural and natural aspects of our nation's heritage."

Parklands Statute, 23 U.S.C. §138 wherein "It is hereby declared to be a national policy that *special effort* should be made to preserve...historic sites."

[25] Respondents are troubled with the argument raised by Petitioner that the form of review exercised by the Secretary of Interior is an example of an improper interference in State

> Clearly, Congress did not intend to leave the decision whether Federal funds would be used to build highways through parks of local significance up to the city councils across the nation. If there was any doubt about this question before *[Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)*]* there most assuredly is no longer any doubt...(From that case) we must conclude...that the Court attached little, if any, significance to local officials' preference to use Overton Park for highway right-of-way. *Named Individual Members of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F. 2d 1013, 1026-1027 (5th Cir., 1971). *Accord, Penn. Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613, 622 (3rd Cir., 1971); *EDF v. Brinegar.*, _____ F. Supp. _____, 6 ERC 1577, 1594 (E.D. Pa. 1974).

One of the more unfortunate consequences of Petitioner's argument is that it necessitates the loss of the one official whose statutory responsibility is evaluating historic sites of local, state and federal significance. This loss is compensated by substitution of an official whose responsibility is not to conduct such evaluations but rather to move people from one city to another in the least amount of time and with the greatest degree of safety. The influence of such a responsibility is tremendous:

> ...there exists a natural, in fact, healthy bias, on the part of most action-oriented Federal agencies in favor of doing what they were established to do; be it build dams, bridges, navigation or irrigation facilities, etc. Unfortunately, much of what many of the action-oriented agencies do is done at the expense of the natural environment. In light of such realities, it would appear to be an exercise in futility to expect such agencies to balance their statutory functions with the national policy of environmental enhancement and do so within the

[25] Continued
matters. Since (T)H-3 is funded under the Federal-Aid Highway program, then by definition there is going to be federal monitoring of the project, a fact Petitioner ignores. Additionally, the Court must realize that in the matter of (T)H-3 Interior was not saying §4(f) applied, but rather *Moanalua Valley is a historic site*. This determination cannot be reversed by Transportation who must then recognize the historical significance of the property involved and apply §4(f). *[36 C.F.R.* §800.4(a)(2)*]*

> spirit of the Act. Hugh J. Yarrington, *Judicial Review of Substantive Agency Deficiencies: The Second Generation of Cases Under the National Environmental Policy Act* (1974)

Certainly the *special effort* called for under 4(f) provides more protection than Petitioner allows.

Finally, Petitioner's argument is unsupportable from a reading of FHWA regulations themselves, 23 C.F.R. §771.19, which automatically extend 4(f) protection to properties listed or eligible for inclusion in the National Register.

> If the project will use land from an historic *property* that is included in or eligible for inclusion into the National Register the 4(f) statement should provide evidence that the provisions of 36 C.F.R. Part 800 have been satisfied. (Emphasis added.) *[23 C.F.R.* §771.19(b)*]*[26]

A logical interpretation of this is that a National Register property automatically receives 4(f) protection. The regulations then carefully distinguish historic *properties* from historic *sites*, stating that:

> If the project will use land from an historic *site* not eligible for inclusion in the National Register, the §4(f) statement should provide evidence that the official having jurisdiction thereof has determined it to be of national, state or local significance. *[23 C.F.R.* §771.19(b)*]*

Determinations regarding an *historic site* are reviewable by FHWA. *[23 C.F.R.* §771.19(c)*]*[27]

Professor Gray explains this distinction in a similar way:

> Unlike section 106 of the National Historic Preservation Act of 1966, which provides for protection of properties on the National

[26] Petitioner argues that the issue is not an interpretation of the NHPA but rather §4(f). *(Pet. 14 n.9)* In view of this language this argument must be questioned.

[27] It was on this portion of the regulations the dissenting Justice Wallace focused his attention in determining the Secretary of Interior acted improperly. *(App. 29)*. The Justice erred by not including 23 C.F.R. §771.19(a) in his assessment.

Register of Historic Places, section 2(b)(2) of the DOT Act applies to any "historic sites," and section 4(f) to any "historic site of national, State or local significance" as determined by either federal, state or local officials having authority to make such determinations. *Therefore, a National Register site is automatically entitled to protection under section 106 of the National Historic Preservation Act*. A non-National Register property, if determined to be of significance by other appropriate authority such as an official state or local landmark commission, also qualifies for protection under the DOT Act even if it is not entitled to protection under sections 2(b)(2) and 4(f) of the DOT Act as well as under section 106. (Emphasis added.)[28]

D. Section 4(f) Applies to the Petroglyph Rock, Pohaku ka Luahine.

The petroglyph rock, Pohaku ka Luahine, was placed on the National Register July 26, 1973. It is, therefore, a significant historic site within the meaning of §4(f). *[C.F.R. §771.19 (July 21, 1976)]*. Petitioner attempts to confuse the issue by emphasizing the physical attributes of the property. He concludes that such qualities cannot meet the standard of definition of what constitutes a §4(f) "site." Petitioner errs on this point for two reasons: First, as pointed out in the preceding section, when dealing with historic properties listed as such on the National Register, FHWA regulations automatically apply 4(f) protection regardless of the physical qualities of the property.

Second, the petroglyph rock is more than the sum of its parts for the rock retains its *historic significance* (to be distinguished from its archeological significance) only so long as it remains where it is in Moanalua Valley. It derives nearly all of its importance from the setting in which it presently rests. It is the heart of Moanalua Valley. Today the daily field trips that go into Moanalua Valley stop at the

[28] Gray, Oscar, *The Response of Federal Legislation To Historic Preservation*, 36 Law & Contemp. Prob. 314, 318 (1972).

rock and learn, with reference to the drawings on the rock, the story of Moanalua and the events associated with it.[29] If the petroglyph rock is moved it will lose most of its historical significance.[30]

Therefore, the petroglyph rock is much more than an inanimate object; it is a site within the meaning of §4(f).

Finally the Petitioner raises a point Respondents do not believe is an issue concerning (T)H-3's use of the petroglyph rock. *(Pet. 25.)* Therefore, the Respondents do not consider it a proper request for this Court's review. *[Tyrell v. District of Columbia, 243 U.S. 1 (1917).]*

However, in fairness to the Court, Respondents will respond to the error in Petitioner's argument.

First, (T)H-3 will be approximately 100 feet from the petroglyph rock. (Petitioner assumes a distance of 200 feet.)

Second, the Advisory Council concluded that "*...implementation of the mitigation measures proposed by FHWA for incorporation into the Memorandum of Agreement would not satisfactorily mitigate the adverse effects on Pohaku ka Luahine*." (Emphasis added.)

Third, in situations like (T)H-3 where there is ambiguity as to the "use" of the property, the first sentence of §4(f) requiring "...special effort...to preserve...historic sites," reinforces the need to apply §4(f). Since this policy is not hortatory it must at least shift the burden of persuasion to the Secretary of Transportation.[31]

[29] *See*, EIS App. A 199-207.

[30] *See*, 36 C.F.R. §800.10(b).

[31] *Pennsylvania Environmental Council v. Bartlett*, 454 F 2d. 613 (3rd. Cir., 1971).

CONCLUSION

For the foregoing reasons, a writ of certiorari must not be granted.

Respectfully submitted,
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*Attorney for Respondents**

*Appellant's attorney wishes to acknowledge the invaluable time and assistance donated by John F. Schweigert, Esq. of Honolulu, Hawaii in the preparation of this Appellate brief.

No. 76-235

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. ALVEY WRIGHT, DIRECTOR OF THE HAWAII DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

STOP H-3 ASSOCIATION, A HAWAIIAN NON-PROFIT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 533 F. 2d 434. The opinion of the district court (Pet. App. 34a-64a) is reported at 389 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976. A timely petition for rehearing, with suggestion of rehearing *en banc,* was denied on May 21, 1976 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Secretary of Transportation was required, before approving the expenditure of federal funds in connection with the proposed construction of a segment of interstate highway in Hawaii, to make the determinations specified by Section 4(f) of the Department of Transportation Act of 1966, as amended, and Section 18(a) of the Federal-Aid Highway Act of 1968.

STATEMENT

The question presented by this case is the applicability of Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, to the proposed construction of a segment of interstate highway in Hawaii. Both statutes (referred to hereafter as Section 4(f))[1] require the Secretary of Transportation to withhold federal funding

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[1]Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), which is identical in pertinent part to Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, provides as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transporation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

for any project involving the use of "any land from an historic site of national, State, or local significance * * * unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such * * * historic site resulting from such use." The Secretary of Transportation, after having concluded that the proposed highway would not use any land "from an historic site of national, State, or local significance," approved the project without determining whether a "feasible and prudent alternative" existed or whether "all possible planning" had been undertaken to minimize harm to historic sites. Petitioner here challenges the decision of the court of appeals disapproving the Secretary's actions.

The essential facts are not in dispute. The purpose of the proposed interstate highway, which is known as ŢH-3, is to connect the leeward side of the Island of Oahu near Honolulu with the windward side of the island near the Kaneohe Marine Corps Air Station.[2] As planned, the highway—ninty percent of the funding for which will be provided by the federal government—will traverse the interior of the island through the narrow Moanalua Valley and come within 100 to 200 feet of a large petroglyph rock known as Pohaku ka Luahine. The Moanalua Valley and the petroglyph rock are both privately owned (Pet. App. 5a-6a).

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[2]A map depicting the proposed highway appears in the petition at page 4.

In March 1973, the Moanalua Gardens Foundation, a private non-profit organization, requested the Secretary of the Interior to include the Moanalua Valley in the National Register of Historic Places as a site of national historic significance.[3] The Secretary's advisory board, formed pursuant to 16 U.S.C. 463, thereafter concluded that insufficient evidence had been presented to demonstrate conclusively that the Moanalua Valley was of national historic significance. The board noted, however, that "[h]istorical, cultural, and the natural values combined with outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest" (see Pet. App. 6a). Meanwhile, in July 1973, the Secretary listed the petroglyph rock located in the valley in the National Register after having received a nomination requesting such action from the State of Hawaii (39 Fed. Reg. 6422).

After the petroglyph rock had been listed in the National Register, the Secretary of Transportation requested the Advisory Council on Historic Preservation to comment, pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. 470f, as amended by Pub. L. 94-422, 90 Stat. 1313, 1320), concerning the highway's potential impact on the rock.[4] As part of its consideration of the matter, the Council requested the Secretary of the Interior to advise it regarding the

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[3]The National Register is maintained by the Secretary of the Interior pursuant to the National Historic Preservation Act of 1966, 16 U.S.C. 470a(a)(1), and the Historic Sites Act of 1935, as amended, 16 U.S.C. 461 *et seq.*

[4]The Advisory Council on Historic Preservation is an independent agency of the United States, whose members include the Secretaries of the Interior and Transportation, with responsibility to comment on federal, federally-assisted and federally-licensed undertakings affecting properties included in or eligible for inclusion in the National Register. 90 Stat. 1320.

historic significance of the entire valley. The Secretary thereafter determined that the valley "may be eligible for inclusion in the National Register of Historic Places and [is] therefore entitled to protection under * * * applicable Federal legislation." 39 Fed. Reg. 16175-16176. In a subsequent letter to Governor Burns of Hawaii, the Secretary explained that although the Moanalua Valley was not of national historic significance, the valley possessed "historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance" (see Pet. App. 7a).

On August 5, 1974, the Hawaii Historic Places Review Board, the state agency responsible for evaluating and nominating Hawaiian properties for inclusion in the National Register, determined that the Moanalua Valley was only of "marginal" local significance (Pet. App. 7a). The board therefore declined to nominate the valley for inclusion in the National Register. At about the same time, the Council on Historic Preservation advised the Secretary of Transportation that the Moanalua Valley and the petroglyph rock possessed "historic, cultural, and archeological significance warranting their preservation" (see Pet. App. 8a).

On September 19, 1974, the Secretary of Transportation concluded that the Moanalua Valley "does not come under the provisions of Section 4(f)" (see Pet. App. 8a). The Secretary also decided to proceed with federal funding of the interstate highway, with certain measures being taken to protect the petroglyph rock from being adversely affected (see Pet. 15, 25).

The Stop H-3 Association, a private non-profit organization, brought this action alleging, *inter alia,* that Section 4(f) was applicable both to the petroglyph rock and the Moanalua Valley. But because the petroglyph

rock had been moved, and theoretically could be moved again, the district court held that Section 4(f) was not applicable to it, despite its inclusion in the National Register (Pet. App. 59a). The court also held that the determination that the Moanalua Valley "may be eligible" for inclusion in the National Register as an historic site of local significance was insufficient to trigger the procedures specified by Section 4(f)—particularly since the Hawaii Historic Places Review Board already had found that the valley was only of "marginal" local significance (Pet. App. 59a-61a).

The court of appeals reversed (by a vote of 2 to 1). With respect to the petroglyph rock, the court held that the Secretary of Transportation was required to comply with Section 4(f) because the rock, although displaced, was sufficiently related to its "immediate environs" to qualify for protection under Section 4(f) and that the proposed highway would pass sufficiently near the rock to " 'use' land from that historic site" (Pet. App. 17a-18a). The court also held that the Secretary of Transportation had erred in concluding that Section 4(f) was inapplicable to the Moanalua Valley. The court pointed out that after the district court's decision the Secretary of the Interior had published in the Federal Register a notice that the valley had been determined to be eligible for inclusion in the National Register (40 Fed. Reg. 23906-23907), thereby obviating any need for the court to decide whether the designation "may be eligible" triggered the procedures of Section 4(f). The court further held that the state determination that the valley was of only "marginal" local significance had not precluded the Secretary of the Interior from determining that the valley was in fact of local significance, or from including it in the National Register on that basis (Pet. App. 8a-11a).

ARGUMENT

Petitioner—the Director of the Hawaii Department of Transportation—argues at length that this case involves delicate and complicated issues of federalism (*e.g.*, Pet. 18). We disagree. This case involves a dispute concerning the significance under Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, of a determination by the Secretary of the Interior, on his own motion, that a property is of local historic significance. This case also involves a factual dispute concerning whether the proposed highway will "use" land from an historic site (Pohaku ka Luahine and its immediate environs), thereby requiring the Secretary of Transportation to make the determinations called for by Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act before approving the expenditure of any federal funds for the project.

Neither of these disputes presents an issue warranting the attention of this Court. The court of appeals' holding that the procedures specified by Section 4(f) are triggered by a determination of the Secretary of the Interior—arrived at without local concurrence—that particular property is of state or local historic significance does not conflict with any decision of this Court or of any other federal court. Neither does the court's holding that the proposed interstate highway will "use" land associated with an historic site (Pohaku ka Luahine and its immediate environs) conflict with the decision of any other court. It is settled that constructive use of an historic site is sufficient to require federal compliance with Section 4(f); the court's holding on this issue thus represents only the application of settled law to "the particular

circumstances of this case" (Pet. App. 18a).[5] Moreover, although the Secretary of the Interior continues to believe that the National Historic Preservation Act of 1966 and the Historic Sites Act of 1935 (see n. 3, *supra*) would empower him to determine, on his own motion, the eligibility of properties for inclusion in the National Register on the basis of their state or local historic significance, under the regulations now governing the National Register of Historic Places Program it is unlikely that this power will be exercised in any significant manner.

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[5]Contrary to petitioner's assertion (Pet. 25), the holding in *ACORN* v. *Brinegar*, 398 F. Supp. 685 (E.D. Ark.), affirmed, 531 F. 2d 864 (C.A. 8), does not conflict with the court of appeals' holding in this case that the proposed highway would "use" Pohaku ka Luahine and its immediate environs. Although the district court held in *ACORN* that the highway there at issue would not "use" a particular public park, the court acknowledged that evidence of a constructive use of the park would trigger the procedures specified by Section 4(f) of the Department of Transportation Act (398 F. Supp. at 692):

> If the park is a public park, it simply cannot be used actually or constructively for federal highway purposes until a proper statutory finding has been made.

[6]The regulations governing the National Register of Historic Places Program specify the manner in which the National Register will be expanded. Those regulations contain no provision for direct listing by the Secretary of the Interior, on his own motion, of areas of state or local historic significance. See 36 C.F.R. 60.2(d). In addition, regulations recently proposed by the Secretary to govern requests for determinations of eligibility for listing—as opposed to actual listing—in the National Register provide that eligibility determinations will be made at the behest of federal agencies needing guidance concerning the impact of proposed projects on properties that may be of historic significance. The proposed regulations do not authorize either state officials or private groups to request determinations of eligibility. Nor do the proposed regulations contain procedures for *sua sponte* determinations of eligibility by the Secretary of the Interior. See 41 Fed. Reg. 17688-17689 (April 27, 1976).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The basic question presented by this case is whether the extraordinary protections of Section 4(f) of the Department of Transportation Act and the corresponding provisions of the Federal-Aid Highway Act apply to the Moanalua Valley, a privately owned alleged "historic site" determined to be of no state or local historic significance by the Hawaii Historic Places Review Board, and of no national significance by the Interior Department,[1] by virtue of a

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[1] The private respondents cite the opinion of an "expert" on Polynesian oral history in suggesting that the Valley should properly be considered an historic site of national significance. (Br. Op. 9) In fact, as described in the Petition, the National Park Service experts concluded that "it would not be possible . . . to professionally defend" a finding of national significance, and the Hawaii Historic Places Review Board, which is composed of historians and other experts on Hawaii, concluded that the "historical" information submitted was "insubstantia[l]," "deficien[t]" and "inaccura[te]." (Pet. 12-13).

determination by the Interior Department that the site is of local significance.

The result of the private respondents' position[2]—adopted by the Court of Appeals—is that the views of competent state and local officials and of the Hawaiian public and the U.S. Department of Transportation are ignored and the construction of a long-planned and necessary highway unreasonably delayed or halted.[3]

1. The argument of the private respondents centers on the National Historic Preservation Act ("NHPA"), a stat-

[2] The Brief for the Federal Respondents in Opposition does not express any view on the substantive issues in the case but simply suggests that the question is not likely to recur because of certain regulations of the Secretary of the Interior. The Federal respondents defended the Department of Transportation's action in the District Court and urged in the Court of Appeals—in a joint brief with the present Petitioner—that the District Court's judgment be affirmed. An explanation for the current silence as to the merits is as absent from the Federal respondents' brief as is any substantive defense of the Court of Appeals' majority opinion. Clearly there is no attempt to defend the decision on its merits. As to the likelihood of recurrence, see part 3, p. 8, below. Since the Federal respondents offer no substantive support for the Court of Appeals' judgment, the remainder of this Reply Brief (except part 3) will discuss the attempt by the private respondents to uphold that judgment.

[3] The private respondents incorrectly claim that TH-3 is actually opposed by the Hawaiian public. (Br. Op. 7-8). In fact, the contrary is true. As previously described, the highway was planned in its present location in response to strong public sentiment. (Pet. 9-10). Moreover, recent surveys show strong continuing support from the public for completion of the highway. *E.g.*, Honolulu Advertiser, p. 1, col. 1 (May 18, 1976). The private respondents also claim that the highway is not consistent with Honolulu's planned development; was not derived from the 1964 Oahu General Plan; and that, in any case, the General Plan is being revised. (Br. Op. 5). In fact, TH-3 was planned precisely in accordance with the 1964 General Plan (See Plan map, reverse side), and the proposed revisions to the Plan do not make any significant changes to the population and growth statistics which demonstrate the necessity for the highway. (Pet. 8-9)

ute which they discuss from pages 12 through 19 of their Brief in Opposition but, curiously enough, do not bother to quote in its entirety. We rectify that omission by printing the NHPA in the Appendix to this brief. A review of the NHPA makes plain the fact that it does not control the present case. Whatever the power of the Secretary of Interior under the NHPA, a finding of local significance by the Secretary of the Interior does not trigger the coverage of Section 4(f).

The NHPA, enacted in 1966, provides for the maintenance of the National Register of Historic Places. The statute also establishes grants-in-aid to the states for historic preservation projects for properties on the Register and for the National Trust for Historic Preservation. Practically the entire text of NHPA is devoted to the procedure for making grants. See Sections 101, 102, 103, 104 and 105, pages 1a-6a, below. Other significant provisions of NHPA establish and make provision for an Advisory Council on Historic Preservation, which renders nonbinding advice to Federal agencies as to the historic merits of properties affected by Federal projects. See Sections 201, 202, 203, 204, and 205, pages 7a-11a, below.

The NHPA contains no particular procedure for the entry of places of purely "local" historical significance on the National Register of Historic Places. It neither expressly empowers the Secretary of the Interior to place such properties on the National Register in the face of a contrary decision from the local authorities, nor does it expressly forbid him to do so. It should be noted, additionally, that the NHPA does not authorize the Secretary of the Interior to declare a property "eligible" for the National

Register except in conjunction with enrolling a property on the Register after it has been nominated.

In an action which even the private respondents admit is unique (Br. Op. 12)—the Secretary of the Interior has on no other occasion declared a property to be of "local" historical significance against the views of the state and local authorities[4]—and "somewhat irregular" (Br. Op. 14), the Secretary of the Interior has declared the Valley to be eligible for the National Register because of his own finding, not concurred in by the local authorities, of its "local" historical significance. However, it is important to note that in fact the Valley has never actually been placed on the National Register. Thus, the question in this case is whether the declaration of eligibility for the National Register on the basis simply of the Secretary of the Interior's finding of "local" significance brought the Valley within the coverage of Section 4(f). (Pet. 3)

Section 4(f) was passed in the form at issue here in 1968, two years after the passage of NHPA. If Congress meant to include every location declared eligible for the National Register to be covered by Section 4(f), it would have been easy enough for Congress in passing Section 4(f) in 1968 to make an express reference to the NHPA. It did not. Rather, the NHPA contains its own provision requiring any Federally-funded project which might affect a property included on the National Register to consider the possibility of preserving the property. That procedure is set forth in Section 106 of NHPA (see page 6a, below), and there is no question but that the Section 106 procedures

[4] These authorities would have, of course, the incentive to nominate worthwhile sites since they would become eligible for the receipt of grants.

were followed here. If the interpretation of the private respondents is correct—namely, that every project eligible for the National Register is entitled to Section 4(f) protection, a protection much more stringent than that of Section 106—it is surprising that Congress did not repeal Section 106 of NHPA in 1968 when it passed Section 4(f), or at least declare it inapplicable to Federally-funded highway projects, since Section 106 would be mere surplusage as to all such highway projects.[5]

2. Thus, even if we assume the propriety of the Secretary of the Interior's action finding the Valley eligible for the National Register under NHPA on the basis of his finding of purely "local" historic significance, against the view of the competent state and local officials, it does not answer the question whether Section 4(f) is triggered. Section 4(f) contains a parallel construction in which it is contemplated that properties may have either local, state or national historic significance and that local, state and Federal officials will make these determinations. The black-letter rules of statutory construction say that words in such a statute must be read distributively and that a stat-

[5] It should be noted that even the law review article so heavily relied upon by the private respondents admits that after passage of Section 4(f), Section 106 of the National Historic Preservation Act still has significance. See Br. Op. 24, where the article is quoted as stating that "a National Register site is automatically entitled to protection under Section 106 of the National Historic Preservation Act." Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law & Contemp. Prob. 314, 318 (1972). If every property placed by the Secretary of the Interior on the National Register for whatever level of historical significance were entitled to Section 4(f)'s protection—which is the private respondents' position—there would be no basis for the article's statement that Section 106 would apply since the far greater protections of 4(f) would, under the private respondents' theory, be operative in each case.

ute of this sort means that the state and local authorities are to make determination as to state and local significance and the Federal authorities as to national significance. (Pet. 19-20) The various authorities are not entitled to fish in each other's ponds for Section 4(f) purposes. The private respondents, on the other hand, say that officials at any level can make a determination as to any level of historic significance; and such a determination would trigger Section 4(f). Yet the absurd consequence of this—which the respondents never discuss—is that the local officials could make a determination of national historic significance for the purposes of Section 4(f). (Pet. 17, 20).

The only other significant aid to statutory construction here, apart from the established rule of statutory construction just discussed, is the legislative history, which we quoted and analyzed at length in the Petition. (Pet. 20-24). That history is to the effect that the Secretary of Transportation's power of ultimate project review is the sole control over a local determination of no local historical significance. This is, of course, the approach of Section 106 of NHPA. That provision, as to a property included on the National Register, orders the head of the agency having jurisdiction to fund a Federal project affecting the property to "take into account the effect of the undertaking" on the historic property; there is no counterpart in Section 106 of the special finding that must be made when Section 4(f) has been triggered. Accordingly, Section 106 of the NHPA leaves the final determination to the agency whose project is involved. Section 4(f) does the same by vesting the review power over state and local determinations in the Secretary of Transportation, who has overall control of highway projects.

The legislative history is thus not consistent with a view that a veto power, subject only to the making of the Section 4(f) finding of "no feasible and prudent alternative," exists in the Secretary of the Interior through finding a property eligible for the National Register because of its local significance. As we have indicated above, that would suggest that Section 106 had been superseded as to highways affecting National Register properties. The legislative history thus clearly supports our view.[6]

There is thus literally no authority whatsoever for the proposition, necessary to the respondents' position, that Section 4(f) status may be triggered by any official, at whatever level, making a determination as to historic significance, at whatever level. Following the established rule of statutory construction here avoids the arrogant affront to the principles of Federalism urged by the private respondents who claim that for Section 4(f) purposes the Valley's local "significance has been established by the highest

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[6] Even the law review article relied upon by the private respondents (Br. Op. 20-21) does not support their arguments. *First*, the Valley is *not* on the National Register. The Secretary of the Interior purported to find that the Valley was "eligible" for listing but never placed the Valley on the Register. *Second*, even if the Valley were on the Register, the article argues only that the word "jurisdiction" in Section 4(f) refers "to more than merely political authority." And so it does; if the Secretary of the Interior found that a state-owned area had *national* historic significance and on this basis put it on the National Register, it is clear that it would be entitled to the protections of Section 4(f). The idea is that a Federal official has power to designate a site as having national significance, whether or not it is within his administrative or political jurisdiction, and a *local or state* historical society has power to designate properties as *local or state* landmarks even though, of course, an historical society would have no political or administrative jurisdiction whatsoever. The article's point is that the existence of political or general administrative jurisdiction is not the touchstone; rather the touchstone is the level of historic significance involved.

[*i.e.*, Federal] authority" and that the "opinion of the State of Hawaii Historic Review Board in no way affects this determination." (Br. Op. 19)

3. The Federal respondents' Brief in Opposition seeks to suggest, without quite saying, to this Court that the situation presented in this case—which admittedly never occurred before—cannot recur in the future. (Fed. Res. Br. Op. 7-9) In order to do this, the Federal respondents utterly confuse our position. The question is not whether the Secretary of the Interior may make a determination as to the eligibility of a property for the National Register "on his own motion." (Fed. Res. Br. Op. 7, 8 n. 5) The question is, rather, whether if he places a property on the Register (or finds it eligible for such placement), either on his own motion or not, on the basis simply of his own finding of "local" historical significance, that finding is significant for Section 4(f) purposes.

The Federal respondents admit (Fed. Res. Br. Op. 8 n. 6) that the Secretary of the Interior may still indicate the eligibility of properties for placement on the Register "at the behest of Federal agencies needing guidance." If at such a "behest" the Secretary places a property on the Register, or makes a determination of eligibility for such placement, purely on the basis of "local" historic significance, notwithstanding a contrary finding by the cognizant state and local bodies, the question presented by this case plainly will recur. The Federal respondents' suggestion that the issue of law presented by this case cannot recur is, accordingly, without foundation.

• • • • •

The decision below as to the principal issue, the status of the Valley, is erroneous. For the reasons developed above (p. 8), there certainly can be no assurance that the issue will not recur. The Solicitor General, who doubtless conferred with the Interior Department during the development of his position, does not even seek to defend the decision below on its merits. It is not much a support for the majority's decision below to say that the situation in question never happened before and to give a lame reason why it may never happen again. The affront to federalism implicit in the divided result in the Court of Appeals warrants, we submit, this Court's review. And as the brief *amicus curiae* tendered by the State of Washington indicates, the erroneous holding below as to the petroglyph rock also raises a question of broad application in other cases.[7] (Pet. 24-25)

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[7] As that brief demonstrates, the question is not one of a factual determination—except to the extent that the Court of Appeals for the Ninth Circuit erroneously proceeded to make *de novo* factual findings—but involves an issue of law as to the proper standard of review.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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November, 1976

APPENDIX

APPENDIX

Text of National Historic Preservation Act

[Public Law 89-665, October 15, 1966, as amended]

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

TITLE I

SEC. 101. (a) The Secretary of the Interior is authorized—

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture; and

(3) to establish a program of matching grant-in-aid to the National Trust for Historic Preservation in the United States, chartered by act of Congress approved October 26, 1949 (63 Stat. 927), as amended, for the purpose of carrying out the responsibilities of the National Trust.

(b) As used in this Act—

(1) The term "State" includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(2) The term "project" means programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure the preservation for public benefit of any such historical properties.

(3) The term "historic preservation" includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term "Secretary" means the Secretary of the Interior.

SEC. 102. (a) No grant may be made under this Act—

(1) unless application therefor is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897);

(3) for more than 50 percentum of the total cost involved, as determined by the Secretary and his determination shall be final;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (2) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States, in which case a grant to the National Trust may include funds for the maintenance, repair, and administration of the property in a manner satisfactory to the Secretary.

(c) No State shall be permitted to utilize the value of real property obtained before the date of approval of this Act in meeting the remaining cost of a project for which a grant is made under this Act.

SEC. 103. (a) The amounts appropriated and made available for grants to the States for comprehensive statewide historic surveys and plans under this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him: *Provided, however,* That the amount granted to any one State shall not exceed 50 per centum of the total cost of the comprehensive statewide historic survey and plan for that State, as determined by the Secretary.

(b) The amounts appropriated and made available for grants to the States for projects under this Act for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved statewide historic preservation plans.

The Secretary shall notify each State of its apportionment, and the amounts thereof shall be available thereafter for payment to such State for projects in accordance with the provisions of this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given, and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection.

SEC. 104. (a) No grant may be made by the Secretary for or on account of any survey or project under this Act with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any survey or project with respect to which assistance has been given or promised under this Act.

(b) In order to assure consistency in policies and actions under this Act with other related Federal programs and activities, and to assure coordination of the planning acquisition, and development assistance to States under this Act with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable, and such assistance may be provided only in accordance with such regulations.

SEC. 105. The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

SEC. 106. The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

SEC. 107. Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

SEC. 108. [Provision as to authorization of appropriations; omitted in this reproduction.]

TITLE II

SEC. 201. (a) There is established an Advisory Council on Historic Preservation (hereinafter referred to as the "Council") which shall be composed of twenty members as follows:

(1) The Secretary of the Interior.

(2) The Secretary of Housing and Urban Development.

(3) The Secretary of Commerce.

(4) The Administrator of the General Services Administration.

(5) The Secretary of the Treasury.

(6) The Attorney General.

(7) The Secretary of Agriculture.

(8) The Secretary of Transportation.

(9) The Secretary of the Smithsonian Institution; and

(10) The Chairman of the National Trust for Historic Preservation.

(11) Ten appointed by the President from outside the Federal Government. In making these appointments, the President shall give due consideration to the selection of officers of State and local governments and individuals who are significantly interested and experienced in the matters to be considered by the Council.

(b) Each member of the Council specified in paragraphs (1) through (10) of subsection (a) may designate another

officer of his department or agency to serve on the Council in his stead.

(c) Each member of the Council appointed under paragraph (11) of subsection (a) shall serve for a term of five years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of from one to five years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not less than one nor more than two of them will expire in any one year.

(d) A vacancy in the Council shall not affect its powers, but shall be filled in the same manner as the original appointment (and for the balance of the unexpired term).

(e) The Chairman of the Council shall be designated by the President.

(f) Eleven members of the Council shall constitute a quorum.

(g) The Council shall continue in existence until December 31, 1985.

SEC. 202. (a) The Council shall—

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation; and

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation.

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations.

SEC. 203. The Council is authorized to secure directly from any department, bureau, agency, board, commission, office, independent establishment or instrumentality of the executive branch of the Federal Government information, suggestions, estimates, and statistics for the purpose of this title; and each such department, bureau, agency, board, commission, office, independent establishment or instrumentality is authorized to furnish such information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

SEC. 204. The members of the Council specified in paragraphs (1) through (10) of section 201(a) shall serve without additional compensation. The members of the Council appointed under paragraph (11) of section 201(a) shall receive $100 per diem when engaged in the performance of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

SEC. 205. (a) The Director of the National Park Service or his designee shall be the Executive Director of the Council. Financial and admininstrative services (including those related to budgeting, accounting, financial reporting, personnel and procurement) shall be provided the Council by the Department of the Interior, for which payments shall be made in advance, or by reimbursement, from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the Secretary of the Interior: *Provided,* That the regulations of the Department of the Interior for the collection of indebtedness of personnel resulting from erroneous payments (5 U.S.C. 46e)* shall apply to the collection of erroneous payments made to or on behalf of a Council employee, and regulations of said Secretary for the administrative control of funds (31 U.S.C. 665 (g)) shall apply to appropriations of the Council: *And provided further,* That the Council shall not be required to prescribe such regulations.

(b) The Council shall have power to appoint and fix the compensation of such additional personnel as may be neces-

* Currently codified as 5 U.S.C. § 5514(b).

sary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949.*

(c) The Council may also procure, without regard to the civil service laws and the Classification Act of 1949, temporary and intermittent services to the same extent as is authorized for the executive departments by section 15 of the Administrative Expenses Act of 1946 (5 U.S.C. 55a),† but at rates not to exceed $50 per diem for individuals.

(d) The members of the Council specified in paragraphs (1) through (9) of section 201(a) shall provide the Council, on a reimbursable basis, with such facilities and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such facilities and services are requested by the Council and are otherwise available for that purpose. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties.

SEC. 206. (a) The participation of the United States as a member in the International Centre for the Study of the Preservation and Restoration of Cultural Property is hereby authorized.

(b) The Council shall recommend to the Secretary of State, after consultation with the Smithsonian Institution and other public and private organizations concerned with the technical problems of preservation, the members of the

* Currently codified as chapter 51 and subchapter III of chapter 53, 5 U.S.C.

† Currently codified as 5 U.S.C. § 3109.

official delegation which will participate in the activities of the Centre on behalf of the United States. The Secretary of State shall appoint the members of the official delegation from the persons recommended to him by the Council.

(c) [Provision as to authorization of appropriations; omitted in this reproduction.]

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

STOP H-3 ASSOCIATION, a Hawaiian non-profit corporation, MOANALUA VALLEY COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, and HAIKU VILLAGE COMMUNITY ASSOCIATION, a Hawaiian non-profit corporation, for themselves and on behalf of their members; FRANCES M. DAMON, HARRIET DAMON BALDWIN, HELEN HOPKINS, KENT MILLER, JOHN MANNING, HAROLD FUJIWARA and VIRGINIA BROOKS, for themselves and on behalf of all other persons similarly situated; MOANALUA GARDENS FOUNDATION; HUI MALAMA AINA O KO'OLAU; LUCY S. NALUAI; OLIVIA PADEKEN; LEROY CHUNG; RANDY KALAHIKI; PHOEBE KAWELO; ROXANNE VELARDE; WILLIAM T. COLEMAN, JR., individually and as Secretary of the United States Department of Transportation; and RALPH SEGAWA, individually and as Hawaii Division Engineer, Federal Highway Administration,

Respondents.

STATE OF WASHINGTON,

Amicus Curiae,

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE & BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October, 1976

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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October, 1976

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STOP H-3 ASSOCIATION, *et al.*,
Respondents.

STATE OF WASHINGTON,
Amicus Curiae,

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Comes now the State of Washington, acting by and through its Attorney General, Slade Gorton, and Assistant Attorneys General, Thomas R.

Garlington and Charles F. Secrest, and hereby request this court to grant permission for the State of Washington to file the attached Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari in the above entitled cause for the following reasons:

1. Since Supreme Court Rule 42, 28 U.S.C.A. provides that it is unnecessary to obtain the consent of the parties to the filing of an *amicus curiae* brief submitted by a State sponsored by its Attorney General, this motion would not ordinarily be made. However, in the instant case, the Clerk's Office requested that this motion be made in light of the status of this case.

2. Supreme Court Rule 42, 28 U.S.C.A. provides that briefs of *amicus curiae* be submitted a reasonable time prior to the consideration of a petition for writ of certiorari. Since the Petition for Writ of Certiorari in the instant case has not yet been considered by the court, nor have all of the briefs of the parties yet been submitted and circulated, it is respectfully submitted that this brief is timely within the requirements of Rule 42. The reason the brief was not submitted earlier was that amicus was unaware that there were proceedings pending in this court until after the Petition for Writ of Certiorari had already been filed. Amicus has proceeded as expeditiously as possible to prepare and submit the attached brief after it obtained knowledge of the pendency of these proceedings.

For the foregoing reasons, the State of Washington respectfully requests that its motion be granted.

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Attorneys for Amicus Curiae
State of Washington

October 1976

IN THE

SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF
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v.

STOP H-3 ASSOCIATION, *et al.*,
Respondents.

STATE OF WASHINGTON,
Amicus Curiae,

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The applicable statutes and decisions involved in this case are set forth in the Petition for a Writ of Certiorari filed by the Director of the Hawaii Department of Transportation and will not be repeated here.

QUESTIONS PRESENTED

The petitioner, Director of the Hawaii Department of Transportation, has presented two ques-

tions for this court to review, stated as follows:

> The provisions of Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal-Aid Highway Act of 1968 impose certain conditions on the approval of any highway program which "requires the use of * * * any land from a historic site of national, state, or local significance as so determined by" "the federal, state, or local officials having jurisdiction thereof." The questions presented in this litigation are:
>
> 1. Whether these statutory provisions apply to a privately-owned alleged "historic site" determined to be of no state or local significance by the State of Hawaii officials having jurisdiction over the site, and of no national significance by the Interior Department, by virtue of a determination by the Interior Department that the site is of *local* significance?
>
> 2. Whether these statutory provisions apply to a petroglyph rock, which is not a "site" at all, which had previously been moved from its original location, and which will be fully protected in its present position by an agreement characterized by the Advisory Council on Historic Preservation to be satisfactory for this purpose?

(Petition 2-3)

The State of Washington supports the petition for a Writ of Certiorari in the above entitled case and concurs with the position of the petitioner. The primary challenge by petitioner is directed to the applicability of Section 4(f), *supra*, to the Moanalua Valley on the Island of Oahu, Hawaii. The State of Washington's primary concern is with the portion of the Court of Appeals' decision which ap-

plied Section 4(f) to the petroglyph rock, Pohaku ka Luahine. As we will subsequently discuss, the court's resolution of that issue creates legal principles having a detrimental impact throughout the Ninth Circuit. In support of that contention, we submit that the second issue raised in Hawaii's petion (quoted above) includes the following questions:

> (a) When neither the Secretary of Transportation nor the United States District Court has found that a proposed highway to be located *near* a protected site under Section 4(f) constitutes a "use" under that section, can an appellate court nevertheless make a "*de novo*" determination that a "use" will occur?
>
> (b) Whether the appropriate standard on which to base a finding that Section 4(f) applies to a project is that of injury in fact to the lands in question?

STATEMENT OF INTEREST OF AMICUS CURIAE STATE OF WASHINGTON

The specific portion of the decision below which is the subject of amicus' interest was stated by the two-judge majority as follows:

> After careful consideration, we cannot escape the conclusion that Pohaku ka Luahine, and its immediate environs, qualify for protection under section 4(f). It is clear that the rock was originally located in the Valley, and it is inseparably linked to historic events that there occurred long since. Consequently, so long as the

> rock remains in the Valley, even though it may stand a few feet from its original location, we believe that it forms the basis for an historic site. *Further, we believe that H-3, which will pass near the rock, will "use" land from that historic site. See Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (a proposed highway that would encircle a public campground would "use" that campground).

(Emphasis added 533 F.2d 434, 445)

By contrast, Judge Wallace in his dissent said:

> The appellants alleged that H-3 would use the rock but the trial court made no findings on the issue and the point has not been argued during this appeal. *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972), requires a broad construction of the word "use" so as to require section 4(f) statements wherever there is a substantial question of adverse impact. * * *
>
> * * * Although we have held that the determination of "use" of a site by a highway is a question of law and not fact, *Brooks v. Volpe, supra*, 460 F.2d at 1194, we cannot resolve the legal issue in the absence of evidence and findings on the effect of the highway on the rock.

The statute before the court was Section 4(f) of the Department of Transportation Act of 1966, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 (hereinafter referred to as Section 4(f), which provide in pertinent part as follows:

* * *

> After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl

> refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

This court has held that, once it is found that a project "uses" lands protected by Section 4(f), the Secretary of Transportation has only a small range of choices available to him if he is to approve the project; he may do so only if there are no feasible alternative routes or if a feasible alternative route involves uniquely difficult problems such as extraordinary costs or community disruption. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

The majority opinion in the instant case expanded the rule expressed in *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972), that the determination of "use" is one of law to be decided by the appellate court without the necessity of findings of fact either by the Secretary of Transportation or the district court. Amicus submits that this Ninth Circuit rule applied in this case conflicts with (1) the principles of judicial review announced by this court in *Citizens to Preserve Overton Park v. Volpe*, *supra*, and (2) the rule adopted by the Eighth Circuit Court of Appeals in *ACORN v. Brinegar*, 368 F. Supp. 685 (E.D. Ark. 1975), *aff'd* 531 F.2d 864 (8th Cir. 1976).

In *Overton*, *supra*, this court provided a three-step inquiry in the judicial review of the Secretary's determination: (1) Did the Secretary act within the scope of his authority? (2) Was the decision made by the Secretary arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law within the provisions of 5 U.S.C. § 706(2)(A)? and (3) Did the Secretary follow the correct procedure in arriving at his decision? This court expressly held that the reviewing court was not to undertake a *de novo* review.

In *ACORN v. Brinegar*, *supra*, the Eighth Circuit adopted a similar rule to be applied in determining whether a highway to be located adjacent to a park constitutes a "use" of the park. Although phrased in different terms, the Eighth Circuit rule can be reconciled with the decision in *Overton*, *supra*, as will be detailed in the following argument.

It is the position of amicus that the determination of whether a proposed highway will "use" a 4(f) property (where there is no physical taking) is to be determined initially by the Secretary based upon the administrative record before him. Judicial review of his determination should be precisely as set forth in *Overton* for the review of a determination by the Secretary as to whether a feasible or prudent alternative exists to the use of a 4(f) property.

The potential for unforeseen federal intervention in the process of locating streets and highways which will exist because of the Ninth Circuit rule is well illustrated by the instant case. There are innumerable small parks, roadside campgrounds, recreation areas, and historic sites, the location of which has been based essentially upon highway access. Federal-aid funds now participate in the cost of a broad array of highway facilities—from the interstate highway to a city or county arterial street. 23 U.S.C. § 103. If mere proximity to any park, recreational, or historic site creates the risk that an appellate court may ultimately find that there is a "use" of the site requiring a relocation unless the "feasible or prudent" standard can be met, state and municipal transportation planners are placed in an untenable position. On the one hand they are required to meet the local or regional transportation needs balanced against possible environmental damage—all developed through lengthy community planning processes. Yet a determination which has carefully balanced both transportation needs and environmental considerations—and most importantly reflects community desires—may be set aside by application of the comparatively inflexible dictates of Section 4(f) by virtue of the *proximity* of the highway or street to a 4(f) site. A predictably anomalous result of such a rule is illustrated by the instant case where, as the dissenting judge noted, the value of the petroglyph rock as an historic place may in-

deed be based upon its easy accessibility to the highway.

The uncertainty of the application of Section 4(f) to highway projects is the basis of the State of Washington's interest in the instant case. Since a number of major highway projects in the State of Washington have involved litigation of a Section 4(f) question, the interest of amicus is indeed very real and substantial.[1] Indeed, there have been two specific instances where the rule adopted by the court below has been applied to highway projects in the State of Washington.

The initial application of the Ninth Circuit's interpretation of the term "use" in Section 4(f) antedates the decision here in question and involved over four years of litigation, direct costs of approximately $2 million, and indirect costs from inflation for a two-year period while a major interstate project was delayed during the preparation of a 4(f) statement. See *Brooks v. Volpe*, 319 F. Supp. 90 (W. D. Wash. 1970), *reversed* 460 F.2d 1193 (9th Cir. 1972); *on remand Brooks v. Volpe*, 350 F. Supp. 269 (W. D. Wash. 1972), *aff'd* 487 F.2d 1344 (9th Cir. 1974); *on remand Brooks v. Volpe*, 380 F. Supp. 1102 (W. D. Wash. 1974); *aff'd sub nom Brooks v. Coleman*, 518 F.2d 17 (9th Cir. 1975).

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[1]Specifically: The section of I-90 between the cities of Mercer Island and Seattle, *see Lathan v. Volpe*, 350 F. Supp. 262 (W.D. Wash. 1972), *aff'd sub nom Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974); the section of I-90 near the Town of North Bend, Washington, *see Daly v. Volpe*, 326 F. Supp. 868 (W.D. Wash. 1972); the section of I-90 at Snoqualmie Summit, *Brooks v. Volpe, supra*, the section of I-82 between Yakima and Prosser, *see Lange v. Brinegar*, ... F. Supp. ..... (E.D. Wash. Aug. 31, 1976).

The second specific application of the Ninth Circuit Court of Appeals' definition of "use" was to the 47-mile I-82 project between the cities of Yakima and Prosser, Washington. In the case of *Lange v. Brinegar*, ... F. Supp. ..... (E. D. Wash. Civil No. 3941, Aug. 31, 1976), the District Court for the Eastern District of Washington, relying on the decisions of the Ninth Circuit Court of Appeals in *Brooks v. Volpe* and the instant case, found that the I-82 project would "use" certain streamside and access easements owned by the Washington State Department of Game and ordered the Secretary of Transportation to make the findings required by Section 4(f). In so holding, the court noted that there was a "use" of the 4(f) lands in question within the meaning of the Ninth Circuit's definition even though no land from the easements was to be physically taken for the project because of certain *possible* adverse environmental impacts on the easements resulting from the highway project.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. The Ninth Circuit Court of Appeals Applied an Inappropriate Standard of Review in Determining That the Proximity of the H-3 Freeway to the Rock Constituted a Use Within the Meaning of Section 4(f)

As was noted in both the decision of the District Court and in the decision of the two-judge

majority of the Ninth Circuit panel on appeal, the Secretary of Transportation made a determination that Section 4(f) did not apply to the petroglyph rock, at least in part, because the project would not "use" the rock.

On appeal, the two-judge majority of the Ninth Circuit panel apparently disagreed with the Secretary since they held that they *believed* that H-3 would use land from the historic site on which the petroglyph rock was located because the highway passed near the rock. The majority did not find that the Secretary had misinterpreted the scope of his authority under Section 4(f), nor that the Secretary had failed to follow the procedures required by law, nor that the Secretary's determination was arbitrary, capricious, or an abuse of discretion. In substance, the determination of the Court of Appeals in the decision below regarding the "use" of the petroglyph rock was a *de novo*[2] finding by the appellate court that a "use" existed.

The Secretary's conclusion that Section 4(f) did not apply to the petroglyph rock since it was not "used" by the H-3 highway project was administrative record. The trial court expressly found:

> * * * that the discussions in the EIS of the impact of the highway on properties pos-

[2]In this connection, we wish to emphasize that the Ninth Circuit Court of Appeals reversed the finding of the trial court in *Brooks v. Volpe, supra*, that there was no "use" of the Denny Creek Campground, and, as discussed *infra*, that the Secretary of Transportation had found that Section 4(f) did not apply to the petroglyph rock in the instant case because it was not "used" by the project. In both cases the Ninth Circuit Court of Appeals determined there was a "use" notwithstanding the earlier judicial and administrative determinations.

sessing historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact, *especially with respect to the petroglyph rock Pohaku ka Luahine* and to Moanalua Valley, were adequate when submitted *both for purposes of NEPA and for purposes of a 4(f) statement.*

(Emphasis added 389 F. Supp. 1102, 1110)

The failure of the majority of the court to confine its review within the bounds of 5 U.S.C. § 701 et seq. in the face of the Secretary's determination that Section 4(f) did not apply, which determination was based upon an adequate administrative record, is in direct conflict with the standard of judicial review mandated by this court in *Overton.*

B. The Decision Below is in Direct Conflict With the Decision of the Eighth Circuit Court of Appeals in *ACORN v. Brinegar*, 368 F. Supp. 685 (E. D. Ark. 1975), Affirmed on Basis of Opinion Below, 531 F.2d 864 (8th Cir. 1976)

Not only did the majority of the court below apply an inappropriate standard of review in determining that there was a "use" of the petroglyph rock, the rule of law applied by the court is diametrically opposed to the rule of law adopted by the Eighth Circuit Court of Appeals in *ACORN v. Brinegar, supra.* The rule of law which the two-judge majority of the Ninth Circuit Court of Appeals' panel applied in the instant case was originally announced in *Brooks v. Volpe, supra,* aptly

stated by the dissenting judge, that a "use" will be found "so as to require a Section 4(f) statement *wherever there is a substantial question of adverse impact.*" In contrast, the courts in *ACORN, supra,* held that the construction of a highway adjacent or near to a public park would not be held to be a constructive "use" in the absence of a showing by a preponderance of the evidence that there was an adverse environmental impact on the park in question. The Ninth Circuit Court of Appeals apparently will presume that a "use" exists whenever a freeway is located "near" property protected by Section 4(f); whereas, the Eighth Circuit Court of Appeals would require a showing of injury in fact before a constructive use would be found.

The rule of the Eighth Circuit Court of Appeals can be reconciled with this court's decision in *Overton, supra,* and applied to the judicial review of a 4(f) decision of the Secretary of Transportation pursuant to 5 U.S.C. § 706(2) (A-D). In *ACORN, supra,* there apparently was no decision of the Secretary of Transportation regarding the applicability of Section 4(f) for the court to review. The trial court was therefore forced to make a *de novo* determination of whether there was a constructive "use" based on evidence presented at trial. This was affirmed by the Eighth Circuit Court of Appeals since there was evidence to support the trial judge's conclusion. On the other hand, the Ninth Circuit Court of Appeals would give no weight

to either the decision of the Secretary of Transportation or the decision of the trial court regarding the applicability of Section 4(f) to a given highway project.

The rule adopted by the Ninth Circuit Court of Appeals is both inappropriate and unworkable. Adverse environmental impacts such as deterioration in air quality and increases in noise levels are capable of being measured by commonly accepted methods of prediction and their relative impacts capable of being quantified by reference to standards which have been promulgated and published. *See* 40 C.F.R., Part 50; 23 C.F.R. § 772. While an aesthetic impact may be difficult to quantify, it is possible to describe the physical features of the project which may be observed from the 4(f) land in question, including landscaping or other screening features to minimize the aesthetic impact of the project. If Section 4(f) is to be applied as a rational policy to enhance and protect recreational and historic sites in terms of the public's actual enjoyment of these resources, their accessibility by way of improved streets or highways should be given appropriate weight in determining whether there will be an injury in fact, and if there is such injury, then there is a constructive use of the site.

Furthermore, the specific information, as it refers to the project, is generally available to the public and reviewing agencies through the discussions contained in an environmental impact statement. *See* 23 C.F.R. § 771.18-.20. In fact, as noted above,

the specific information concerning potential adverse environmental impacts on the petroglyph rock was available to the court for review in the instant case.

The test of injury in fact is the only workable rule. As applied, the rule of the Ninth Circuit Court of Appeals presents a problem to the transportation planner which is virtually impossible to administer. It is clear that the applicability of Section 4(f) to a project is the key element in the transportation planning process. Under the rule adopted by the Ninth Circuit Court of Appeals the transportation planner can never be certain whether Section 4(f) applies until the "substantial question of adverse environmental impact" has been answered in the minds of the appellate court. On the other hand, the rule of the Eighth Circuit Court of Appeals which requires a showing of injury in fact to bring the provisions of Section 4(f) into play is one capable of determination by the transportation planner at an early stage of the planning process.

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be issued.

Respectfully submitted,

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October, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

-v.-

STOP H-3 ASSOCIATION, *et al.*

Respondents.

BRIEF FOR RESPONDENT STOP H-3 ASSOCIATION, *et al.* IN OPPOSITION TO BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTORY STATEMENT

Although Respondent Stop H-3 Association believes the Motion by the State of Washington to file an Amicus Curiae brief is untimely made within the scope of Rule 42 of the Rules of the Supreme Court of the United States, they must respond to the following arguments made by the State of Washington should this Motion subsequently be granted.[1]

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[1] Respondent must also correct the statutory error in petitioners' reply brief quoting the National Historical Preservation Act. Section 106 of the Act (Pet. R. Br. App. 6) has been amended by Pub. L. No. 94-422 §201 (3) (September 28, 1976) by inserting after the word "included in" the phrase "or eligible for inclusion in." Now under the act both of these determinations constitute finding of an historic site.

QUESTION PRESENTED

Whether the determinations of the Secretary of Transportation and the Advisory Council on Historic Preservation that a project will "adversely affect" a historic site constitute a "use" within the meaning of 23 USC §138.

STATEMENT

The State of Washington assumes that the Ninth Circuit unilaterally took upon itself the responsibility of determining the "use" (T)H-3 would have on the petroglyph rock, Pohuku ka Luahine. It further argues that the Secretary of Transportation should have been afforded the opportunity to rule in this matter prior to the decision of the Ninth Circuit.

This assumption ignores one important fact. In the case of (T)H-3 it was the Secretary of Transportation acting in cooperation with the Advisory Council on Historic Preservation who determined that the petroglyph rock would be adversely affected by the highway project.

ARGUMENT

The State of Washington concludes from Judge Wallace's dissent that there was no evidence before the Ninth Circuit for it to rule on whether (T)H-3 would constitute a "use" of the petroglyph rock within the meaning of 23 USC §138. However, this assumption ignores the extensive documentation that took place both at the administrative level and before the District Court. This documentation was also included in the Record on Appeal.

More specifically, in discussions between the Advisory Council on Historic Preservation and the respective Federal and State highway officials it was clearly demonstrated and unquestioned that (T)H-3 would adversely affect the petroglyph rock. In fact, further consultation ended with the reaching of a tentative agreement on measures to mitigate the *adverse* effects of (T)H-3 on this property in June of 1974. *See* 36 CFR §800.5(f) (1975). Respondent believes this agreement presumes a "use" of the petroglyph for purposes of §4(f). *See* 36 CFR §800.4(b)(c) (1975).

Subsequently, the respective Federal and State highway officials met before the Advisory Council on August 7 and 8, 1974, to further discuss the adverse effect of (T)H-3 on not only the petroglyph rock but all of the Moanalua Valley as well. The conclusion of the Council as pertains to the petroglyph was as follows:

> 1. *Pohaku ka Luahine*–In applying the Advisory Council's "Criteria of Adverse Effect" the Council concludes that construction of the proposed H-3 will have an *adverse effect on the National Register property by isolating the property from its surrounding environment, and by introducing visual, audible and atmospheric elements that are out of character with the property and alter its setting*. (Emphasis supplied)

Clearly, then, all concerned administrative personnel including the Secretary of Transportation realize that (T)H-3 will adversely affect the petroglyph rock. The question then becomes whether such impact constitutes a "use" within the meaning of 23 USC §138.

Although the precise meaning of what constitutes a "use" is not defined under the law, a consistent and long-standing administrative practice of the Department of Transportation (hereafter referred to as DOT) is to treat a project as one which "uses" 4(f) lands if the project (1) "physically occupies the land" or (2) generates "sufficiently serious impacts on the land as to impair substantially the utility of the land for the purposes for which it was used before the off-site DOT activity was undertaken." *See* Gray, *Section 4(f) of the Department of*

Transportation Act, 32 Md. L. Rev. 327, 358 n. 72 (1973)[2]. Stated more simply, DOT will treat a protected site if the project will directly or indirectly cause a substantial and *adverse impact* on the site.[3]

The case law adopts this interpretation, and elaborates on it. *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972), rev'g. 319 F.Supp. 90 (W.D. Wash. 1970), 329 F. Supp. 118 (W.D. Wash. 1971), on remand 350 F. Supp. 287 (W.D. Wash. 1972); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 362 F. Supp. 627, 639 (D. Vt. 1973); *Citizens for Mass Transit v. Brinegar*, 357 F. Supp. 1269, 1280 (D. Ariz. 1973); *Arizona Wildlife Federation v. Volpe*, 4 ERC 1637, 1638-9 (D. Ariz. 1972); *D. C. Federation of Civic Assns. v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971) supplementing 434 F.2d 436 (D.C. Cir.), rev'g. 308 F. Supp. 423 (D.D.C), 316 F. Supp. 754 (D.D.C. 1970), reh. den. ___ F.2d. ___ (D.C. Cir.), cert. den. ___ U.S. ___, 92 S.Ct. 1290 (1972).

In *Conservation Society of Southern Vermont v. Secretary of Transportation, supra*, the defendants argued that the bordering

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[2] DOT has recognized the principle that a transportation project can be physically separated from a protected area and still constitute a "use" within the meaning of section 4(f). *DOT Reprint of Statement of Herbert F. DeSimone, Assistant Secretary of Transportation for Environment and Urban Systems, before the Senate Committee on Commerce Regarding S. 728, May 3, 1971*. In this statement he said that DOT "has adopted...[a] broader meaning" of section 4(f) so as to "provide protection" in situations where "a transportation facility is located adjacent to a protected area but does not require the taking of land from it" in "the physical sense, but would substantially interfere with the use to which that land is dedicated." *Id. at 4*. Senate Bill 728, 92d Cong., 1st Sess. (1972), as introduced by Senators Hartke and Hart, would have, *inter alia*, added the words "...has an adverse effect on the environment in..." before "requires the use of land from..." in section 4(f).

[3] As to the criteria of an adverse effect *see* Advisory Council Procedures at 36 C.F.R §800.9 (1975).

of the Lye Brook Backwoods Area, an 11,000 acre wilderness/recreation area, by a proposed federal-aid primary highway would not constitute a use of the area. Relying on, and quoting the controlling language in *Brooks v. Volpe, supra*, the argument is rejected. 362 F. Supp. 627, 639.

In *Citizens for Mass Transit v. Brinegar, supra*, the defendants argued that the construction and utilization of a section of Interstate I-10 in what from the opinion appears to be the approximate vicinity of a public park of undisclosed dimensions would not constitute a use of the park. The argument is rejected.

> This Court is not unmindful that the proposed alignment may be considered a "use" of Berney Park within the meaning of 23 USC §138 even though the actual acreage over which the freeway will pass may be said no longer to be a park of local significance. *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972). The fact that the remainder of Berney Park is immediately adjacent to the freeway route is enough to require a 4(f) statement. *Id.* 357 F. Supp. 1269, 1280.

In *Arizona Wildlife Federation v. Volpe, supra*, the defendants argued that a federal-aid forest highway project to be built along one side of what appears from the opinion to be a large triangular-shaped recreational area in which are located several lakes would not use the entire area. Citing *Brooks v. Volpe, supra*, and *D.C. Federation of Civic Associations v. Volpe, supra*, the argument is rejected. 4 ERC 1637, 1638-9.

In *D. C. Federation of Civic Association v. Volpe, supra*, the so-called "Three Sisters Bridge" case, the federal defendants acknowledged that because of the actual physical taking of "some parkland" and a portion of the Georgetown Historic District which would result from the construction of an Interstate Highway Bridge over the Potomac, compliance with 23 USC §138 was required, but, in order to limit the scope of that

compliance, argued that a highway uses only those lands which are situated within the right-of-way. The argument is rejected.

> More is at stake, however, than the "minimum taking" of parkland. Section 138 speaks in terms of minimizing "harm" to parkland and historic sites, and the evaluation of harm requires a far more subtle calculation than merely totaling the number of acres to be asphalted. For example, the location of the affected acres in relation to the remainder of the parkland may be a more important determination, from a standpoint of harm to the park, than determining the number of affected acres...In addition, *a project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and "take" it in every practical sense*. (Note omitted) (Emphasis supplied) 459 F.2d 1231, 1239.

Therefore the rule to be applied here is this: Wherever (T)H-3 may, either directly or indirectly, cause a serious adverse impact on the petroglyph rock, the statute applies. Where there is "a substantial question" as to the nature of the impact, the presumption is in favor of the application of the statute. There being *documented* findings by the Secretary of Transportation in the Record on Appeal that an adverse impact is imminent with construction of (T)H-3, Respondents must conclude that the Ninth Circuit was not engaging in a *de novo* determination that a "use" will occur. Rather the Court was merely reiterating a determination made much earlier in the history of (T)H-3.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be denied.

Respectfully submitted,

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*Respondents wish to acknowledge the assistance of John F. Schweigert, Esq. of Honolulu, Hawaii, in the preparation of this Brief.